86-734

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ROTHERY STORAGE & VAN CO., INC., *et al.*,
Petitioners,

v.

ATLAS VAN LINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The decision of the Court of Appeals for the District of Columbia Circuit, in review of a decision on cross motions for summary judgment, in this horizontal restraint case, raises three fundamental and important antitrust issues under Section 1 of the Sherman Act:

1. Whether the analysis of an horizontal restraint among competitors, arguably associated with a 'contract integration', must conclude with a determination of lawful purpose and effect if the combined market share of the participants in the restraint is on the order of 6-9%, notwithstanding parallel restraints by leading firms foreclosing in the aggregate over 70% of the market to the restrained competitors, and record evidence indicating anticompetitive purpose and effect;

2. If a restraint is deemed to be efficiency oriented, whether it is to be deemed lawful without any weighing of procompetitive benefits and anticompetitive drawbacks, and without any requirement that available less or least restrictive alternatives be utilized;

3. Whether an asserted free-riding justification for market restraint can be sustained on finding some arguably uncompensated benefits to one set of the contracting parties without taking into account countervailing benefits, pricing terms in the relationship, or the existence of factual dispute as to net benefits and burdens among the contracting parties.

The first and second of these issues present important questions of law regarding the interpretation of recent decisions of this Court in Broadcast Music, Inc. v. C.B.S., Inc., 441 U.S. 1 (1979); N.C.A.A. v. Board of Recents of Univ. of Oklahoma, 104 S.Ct. 2948 (1984); Northern Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 105 S.Ct. 2613 (1985); and F.T.C. v. Indiana Federation of Dentists, 476 U.S. ___, 90 L.Ed.2d 445, 106 S.Ct. ___, June 2, 1986); as well as presenting an explicit overturning of United States v. Topco Associates, 405 U.S. 596 (1972). The second and third issues raise a direct

conflict with the District of Columbia Federal Cicuit decisions and a conflict in other circuits decisional law, Kreuzer v. American Academy of Periodontology, 735 F.2d 1479 (D.C. Cir 1984); United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1981); National Bankcard Corp v. VISA, USA, 779 F.2d 592 (11th Cir. 1986); Gen'l Leaseways v. Nat'l Driver Leasing, 744 F.2d 588 (7th Cir. 1984).

PARTIES TO THE PROCEEDINGS

Petitioners, Rothery Storage & Van Co., et al.,were appellants below on the issue presented for review. Respondent, Atlas Van Lines, Inc., was appellee below on the issues presented for review.

Rothery Storage & Van Co. certifies that the following named parties appeared in the proceedings below:

Rothery Storage & Van Co.,
Plaintiff-Appellant
A. Walecka & Son, Inc.
Plaintiff-Appellant
A & L Movers, Inc.,
Plaintiff-Dismissed;
Ace World Wide Moving of Milwaukee, Inc.
Plaintiff
Camp Curtin Transfer, Inc.
Plaintiff-Appellant
Collins Brothers Moving Corp.
Plaintiff-Dismissed;
J. Fishman & Son, Inc.
Plaintiff-Appellant
Major Van Lines, Inc.
Plaintiff
Richard Coriell & Company
Plaintiff-Appellant
Warsaw Moving & Storage, Inc.
Plaintiff-Appellant
Walker Transfer
Plaintiff-Dismissed

Allstate Moving & Storage Co.
Plaintiff-Dismissed
ABC Relocation Services, Inc.
Plaintiff-Appellant
Dobson The Mover
Plaintiff-Appellant
Needles Moving & Storage, Inc.
Plaintiff-Dismissed
Interstate Commerce Commision
Defendant-Dismissed
Chairman Reese Taylor
Defendant-Dismissed
Commissioner Frederic N. Andre
Defendant-Dismissed
Commissioner Reginald E. Gilliam
Defendant-Dismissed
Commissioner Heather J. Gradison
Defendant-Dismissed
Commissioner J.J. Simmons
Defendant-Dismissed
Commissioner Malcolm B. Sterrett
Defendant-Dismissed
Atlas Van Lines, Inc.
Defendant-Appellee

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IN THE SUPREME COURT
OF THE UNITED STATES

ROTHERY STORAGE & VAN CO., et al.

v.

ATLAS VAN LINES, INC.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Rothery Storage & Van Co., et al., by C. Jack Pearce, attorney of record, herein submits the within Petition seeking discretionary review of the issues raised here.

OPINION BELOW

The opinion of the Court of Appeals, (App. pp. 1a-45a) is officially reported at 792 F.2d. A request for rehearing en banc, was denied, on August 7, 1986. The opinion of the District Court (App. 47a-

125a) is officially reported at 597 F. Supp. 217 (D.D.C. 1984).

JURISDICTION

The judgment of the Court of Appeals (App. pp 1a-45a) was entered on June 3, 1986. The jurisdiction of the Court of Appeals was predicated upon 28 U.S.C. §1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES

Section One of the Sherman Act, 15 U.S.C. §1 (1976), provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

The Revised Interstate Commrce Act, 49 U.S.C. §10934(d), provides:

> (d) The antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12), do not apply to discussions or agreements between a motor common carrier providing transportation of household goods

subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and its agents (whether or not an agent is also a carrier) related solely to (1) rates for the transportation of household goods under the authority of the principal carrier, (2) accessorial, terminal, storage, or other charges for services incidental to the transportation of household goods tranported under the authority of the principal carrier; (3) allowances relating to transportation of household goods under the authority of the principal carrier, and (4) ownership of a motor common carrier providing transportation of household goods subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title by an agent or membership on the board of directors of any such motor common carrier by an agent.

STATEMENT OF THE CASE

This case will determine whether the competitive potentials unleashed by transport deregulation legislation of 1980 will be curtailed by restraints imposed by interstate household goods

industry participants, involving group boycott arrangments, effectuated through networking entities known as van lines.

Prior to the passage of the Motor Carrier Act of 1980 (Pub.L. No. 96-296, 94 Stat. 793) and Household Goods Transportation Act of 1980 (Pub.L. No. 96-454, 94 Stat. 2011), interstate household goods transport was substantially cartelized by Interstate Commerce Commission regulation. Entry was limited by a required and usually expensive showing of public convenience and necessity. Prices were agreed to in rate bureaus with immunity from the antitrust laws. Those companies having interstate authority were permitted to enter into antitrust-exempted "pooling agreements" which typically contained exclusive dealing clauses limiting a moving company to affiliation with one major van line, and preventing it charging a different rate on its own

authority than its van line's rate. 1/

The 1980 reform legislation threatened this set of entry and pricing restraints. Interstate authorities became easily obtained. The firm both an interstate carrier and an "agent" for a van line (a "carrier agent", in the jargon of the trade) could now price its interstate services independently. Continuation of local-firm ownership interests in interstate, networking, "van lines" and continuation of "pooling agreements" were permitted, but the 1980 legislation made clear that moving firms represented on the van line board of directors were to limit their discussions and agreements to the rates and practices of the van line, and not to enter into agreements

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1/ Pooling agreements typically waived exclusive dealing and price restrictions as to shipments by the U.S. government, a buyer sufficiently far sighted and sizable to discourage such restraints on its shipments.

restraining their own independent rates and services. 49 U.S.C. 10934(d) Remnants of the cartelization period remained, however. These included a pervasive set of exclusive dealing arrangements detailed later.

The household goods transport sector rests on a base of independently owned and identified, largely localized moving firms, typically conducting local, intrastate and interstate operations. Such moving and storage firms typically conduct their own advertizing and direct sales efforts; pack, load and warehouse the goods; transport the goods in a truck owned or contracted from an owner operator; and either deliver the goods or arrange with a distant firm like their own for delivery. Some such companies have come to have several branches and are regional or even national scope: most remain one town or one city businesses.

To terminate a shipment far distant from its base, and to load its truck for subsequent movement, such a localized moving and storage company needs the cooperation of a distant moving firm. The litigants agreed that ready access to numerous, dispersed distant moving firms is essential to successful interstate operation. (PSF III - A)2/ Over time, organizations named "van lines" were created to mediate and simplify long-

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2/ Abbreviations used hereafter are as follows: PSF=Plaintiffs' proposed statement of material undisputed facts; DSF= Defendant's proposed statement of material undisputed facts; DRPF = Defendant's Response to Plaintiffs' Facts; PSGI= Plaintiffs' Statement of Genuine Issues. Defendant did not dispute most of the Plaintiffs' proposed fact statements. Therefore, wherever a PSF designation is used in the text, that statement is undisputed unless otherwise noted. Where Plaintiffs introduced evidence not included in an undisputed fact statement, that evidence is specifically referred to, often with reference to whether the Plaintiffs understand it to be uncontradicted. Defendant's proposed, frequently long, fact statements were usually disputed at least in part. Comments

distance interactions between the local firms. At least three of the six leading van lines were created and initially owned by the localized moving firms themselves (Allied, United Van Lines and Atlas). The van line essentially coordinates movements among the contractually affiliated moving and storage firms, collects and distributes revenues for completed shipments to the participating firms while retaining a portion for its coordinating service, and furnishes a national network name which each affiliated company can sell in addition to its own local identity. (PSF II-D, V-D) These services are supplemented by offers of driver training and sales supplies. Very limited national advertising is provided, at least in the case

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concerning defendant's fact statements are referenced to plaintiffs' statement of genuine issues, to permit examination of areas of agreement and disagreement.

of Atlas. When a shipment moves on van line registry the van line assumes final carrier responsibility to the shipper (PSF V-D) (though it can and usually does demand indemnity for claims from the moving firm(s) originating or otherwise handling the shipment).

According to Interstate Commerce Commission statistics about 80% of the longer haul interstate household goods shipments move on the registry of just six major van lines. However, when not precluded by regulatory barrier or contract stipulation, the local moving company has had the choice of relying entirely on itself and known industry contacts, or using brokers, to manage its shipment and equipment to and from distant points.

The van lines thus were created to provide a complementary service to localized moving firms. Van lines and

"agent" firms have a contractually codified mutual interest, and thus a joint interest in the success of their contract integration (including, on occasion, a joint interest in suppressing parallel competition).

The "van line" service is indisputably useful. However, its competitive merit has not as yet been tested against independent operations, brokerage-mediated networking, or new networking entities having access to the market unimpeded by regulatory restraint and the private restraints later detailed.

This industry composition allows potential for several horizontal competitive relationships. Moving and storage firms are often competitors of each other as to local and intrastate movements, not involving either van lines or distant mover connections. Moving firms have been competitors for interstate business which

they commit to and move within the van line framework. And each such firm has been an actual or potential competitor to any van line servicing it (and thus also with with those "agents" cooperating with the van line), to the extent it had the capacity and desire to manage interstate moves on its own or in cooperation with firms other than the van line. All these competitive relationships were stipulated in this record. (E.g. PSF V-G, V-K.)

Because the bulk of the intercity household goods business is generated by the local moving firms, exclusive dealing and other van line mediated restraints on those firms affect the bulk of the revenues involved in the interstate trade. Restraints on those "carrier agents" which at the time of the 1980 partial deregulation were conducting some independent interstate carrier operations targeted that subset of the moving trade

which was most visibly capable of initiating new alternatives to those van line operations which were in place in 1980; whether by direct independent operations, working through brokers or creating new networking entities.

Atlas was created in the 1940's by "carrier agents," and enjoyed its major growth as an agent and carrier-agent owned corporation until a public offering of its stock in 1980. Entering the 1980's, carrier agents constituted about 20% of Atlas' 490+ affiliates. According to Atlas' data, these carrier-agents contributed a disproportionately high 35% of the revenues and hauling capacity committed to Atlas. (PSF II-J, DRPF II-J).

Until 1982, Atlas and the "carrier agents" had on file with the Interstate Commerce Commission an approved pooling agreement which contained the usual ex-

clusive dealing clause but did not restrict carrier agents independently accessing other firms associated with Atlas.

At all relevant times a majority of Atlas' Board of Directors were owners of local or regional moving and storage firms.

The firms represented in Atlas' Board of Directors, all veterans of the era of regulatory cartelization, reacted to the 1980 "deregulation" legislation with apparent alarm. In 1979, as entry became de facto easier in anticipation of passage of the long-pending legislation, Atlas' Board issued a directive prohibiting any affiliated firm "acquir(ing) any new interstate authority or apply(ing) to add to his present interstate authority". Atlas was to enforce this edict by refusing to handle shipments to and from other affiliated firms within the geogra-

phic scope of any authority which might be acquired. (PSF V-A, V-B). (Some affiliated firms did and some did not challenge this policy by acquiring interstate operating authorities. Atlas apparently did not actively enforce it.)

In 1980, Atlas' Board announced but quickly abandoned a plan to buy all the interstate operating authorities of all contractually affiliated firms. (PSF V-F) In 1981 the Atlas Board of Directors announced a policy which would have forbidden (1) any "carrier agent" access to any other firm affiliated with Atlas for the purpose of terminating shipments or originating backhauls, and (2) mixing on one vehicle the "carrier agent's" shipments with those on Atlas registry. (PSF VI-G, VI-H) Atlas suspended this policy after the Interstate Commerce Commission sued (PSF V-I), alleging that such changes in Atlas' contracts constituted

an unauthorized, anticompetitive modification of the approved "pooling agreement" between Atlas and its "carrier agents."

The Atlas Board's 1982 initiative effectuated the essentials of the 1981 program but avoided regulatory review. All affiliated "carrier agents" were required to spin off their interstate carrier operations into a separate firm with a new name, while dedicating their existing names, commercial reputations and goodwill entirely to Atlas. Such spun off carriers would be denied access to all of the 490+ moving and storage firms which were under contract to Atlas, for backhaul generation (in substance, for all but incidental and occasional services). The newly bifurcated affiliates could not use one truck efficiently to haul independent carrier and Atlas-registered shipments. Atlas re-

quired all affiliated "agents" to deny services to the carrier-agents' carrier operations and launched a program seeking the explicit agreement of all the 94 "carrier-agents" with the program. (PSF VI-N through VI-R) After the Interstate Commerce Commission declined jurisdiction over this program (Atlas Van Lines, Inc. - Pooling, No. MC-F-14784 (Declaratory Order, Feb. 17, 1983), the Petitioners, with other firms named herein, initiated this antitrust action.

In deposition and document discovery, Petitioners established the following additional facts relevant to the rationale of the Court of Appeals' decision. The Atlas Board's carrier agent policies precursor to the 1982 policy had as a principal motivation fear of loss of revenue to the Atlas assemblage from previously localized moving firms using new market freedoms to ini-

tiate more independent and competitive operations. (PSF VI-V) The 1982 carrier agent policy was initiated in the context of Atlas Board members' fear that after passage of the 1980 "deregulation" legislation "agents" would proliferate independent, price competitive operations (PSF VI-W).3/

A group of six major van lines control through contracts with local and regional moving and storage firms over 80% of the business handled by the 15

3/ The concern of Atlas' Directors with the prospect of additional price competition was amply evidenced throughout the record. E.g., in deposition review of notes director John Westerberg made during Board of Directors formation of the Atlas carrier-agent policies:

> Q: This note "Agents won't be able to file lesser rates," was that a concern which you were addressing?
>
> A: It was a major concern.

John Westerberg Deposition, September 27, 1983, p. 38.

largest interstate movers (PSF, App. F). Petitioners proposed that these and other data not disputed by Defendants (PSF III-H) established a long-haul intercity market which these major van lines dominate.

Petitioners and defendant jointly introduced evidence concerning the exclusive dealing and "carrier agent" policies of the leading van lines other than Atlas. (PSF, App. G) Petitioners assert that these data show (1) that five of these six leading van lines have all their affiliated moving and storage firms, or agents, under exclusive dealing contracts which bar those affiliates from cooperating substantially with the carrier operations of the carrier agents, and (2) in addition five of the six major van lines had in place or in initial stages "carrier agent" policies similar to Atlas', likely to curtail the indepen-

dent competitive operations of firms then associated with them and any of the petitioner firms which might consider affiliating with them.

This evidence, along with market shares, is summarized in the following table taken from PSF, App. F, G. The market shares are stipulated between Petitioners and defendant Atlas. The designations "EA" and "CAR" represent, respectively, exclusive agency requirements and present or proposed restrictions on the use of carrier agent authorities.

		Share of Revenues of 15 Largest Carriers	
1.	Allied Van Lines, Inc.	18.9%	EA, CAR
2.	North American Van Lines, Inc.	18.5	EA, CAR
3.	United Van Lines, Inc.	16.2	EA, CAR
4.	Aero-Mayflower Transit Co.	12.0	EA, CAR
5.	Bekins Van Lines Co.	9.6	
6.	Atlas Van Lines, Inc.	8.3	EA, CAR

7.	Global Van Lines, Inc.	4.5
8.	Burnham Van Services, Inc.	2.8
9.	Wheaton Van Lines, Inc.	2.6
10.	American Red Ball Transit	1.7
11.	Neptune World Wide Transit	1.5
12.	National Van Lines, Inc.	1.1
13.	Pan American Van Lines, Inc.	0.8
14.	Cartwright Van Lines, Inc.	0.7
15.	Interstate Van Lines, Inc.	0.6

Petitioners also introduced evidence that the leading van lines closely monitor each others' competitive actions, facilitating parallelism 4/ and that Atlas Board members were well aware that curtailing the access of the carrier agent firms to distant connections would, in this industry context, be extremely detrimental to any effort to continue

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4/ (E.g. a United Van Lines study of the six firms considered competitors was reproduced and distributed to senior Atlas management by Atlas President, PSF, App. G., pl. doc. nos. 001076-001104.)

competitive carrier operations. E.g. the notes of Director Westerberg in preparation for a Board decision on one of the versions of the carrier agent policy:

> If you are still concerned about AVL losing business and being destroyed by freedom of entry of agents getting authority simply restrict any agent operating on his own authority from using any AVL agent for terminal services. That will handle the problem very quickly. Westerberg Dep., Ex. 5 at 6.

Petitioners uncontradicted evidence showed that the Atlas Board and Officers knew that reserving to Atlas the use of the established local market identities of the affiliated moving and storage firms would afford to Atlas (and deny to competitive carrier operations) a major marketing advantage. E.g. statement of Atlas President Bland at May 19, 1982 Board meeting with protesting carrier agents, as to why Atlas insisted on exclusive use of the local firms' local market identities:

> One of the things, while some of you may think we have lost sight of this, one of the things we haven't lost sight of is the fact that people call Bluff City, for the most part. They don't call Atlas Van Lines. Sure there is a brand name identity and there is a brand name identification, but they really call Bluff City....Primarily, in your community, you are the people in the public's eye. (Transcript, p. 28)

Defendant's evidence showed that 20 of the 94 "carrier agents" -- over 20% -- addressed by the 1982 carrier agent policy ceased independent interstate carrier operations consequent to implementation of that policy (DSF 82). 5/

Relevant to the "free riding" issue, Defendant admitted that "Atlas' own personnel do not book shipments" and the direct sales efforts of the "agents" generate business, such as prized

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5/ Defendant did not dispute that one firm accounting for about 8% of Atlas total revenues avoided any use of its independent authority from the date of the first Atlas carrier agent policy announcement in 1979, for fear of termination. (Steiner Dep. 6-8).

"national account" business (PSGI 5, 86, 87, first sentence); "Almost all hauling is done by agents" (PSGI 6); and Atlas owned about 25 vehicles whereas agents owned (and operated) about 5,000 vehicles (PSGI 7). Defendant Atlas recognized that "Agents perform the services of booking and hauling shipments in agency-owned equipment." Agents also provide origin and destination services. (PSGI 4, p. 10).

Petitioners established that "Each plaintiff owns its own office and warehouse facilities and equipment" (PSF I-D), and that plaintiffs pay their own costs of maintaining their equipment and facilities, save for noted minor exceptions such as an Atlas small contribution to a group advertising program and contribution to the agent's cost of painting agent-owned trucks with the Atlas logo and colors. (PSF V-C) Petitioners also

established by deposition of an Atlas Director that when "carrier agents" operate on their own authority they do not use the Atlas administrative network -- they make their own arrangements for connecting with other moving and storage firms, using the services of those firms, and the like. (Shetler, Dep. 79-81) 6/

Petitioners showed that Atlas provided services to affiliated firms in exchange for an elaborately articulated service charge or commission. 7/ and Petitioners' affidavits indicated that

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6/ Given that Mr. Shetler's statement negates direct free riding, Atlas appears to claim that an independent interstate carrier's making an independent contact and contract with an independently-owned moving firm, without using Atlas' dispatchers, payment system, or other services, is somehow a use of Atlas' system, in the sense of using assets owned by Atlas. This is a non sequiter.

7/ Atlas charges were set out in the "Operating By-laws and Rules and Regulations," supplemented by a "Finance and Accounting Information Manual" and periodic bulletins.

Atlas charged specifically for ancillary services such as sales aids and driver training. (Affidavits of Coriell, Terry and Fisher, PSGI).

Further as to claimed justifications for the Atlas carrier agent policies, Petitioners'uncontradicted analysis of Atlas' records showed that Atlas had sustained virtually no monetary loss on claims arising from independent carrier operations of agent firms in a preceeding four year period. 8/

The Atlas Board members had not developed or received any data showing any increase in customer confusion resultant from increased carrier operations of carrier agents, or any decrease in equipment availability to Atlas resultant from

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8/ Affidavit of Janet Pearce, attached to Plaintiffs' Reply to Defendants Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Partial Summary Judgment as to Liability.

EDITOR'S NOTE

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(1959), and United States v. Parke, Davis & Co. 362 U.S. 29 (1960). Petitioners also urged that the facts satisfied recently articulated criteria for application of the per se rule in such cases as Broadcast Music, Inc. v. Columbia Broadcasting Systems, 441 U.S. 1 (1979); N.C.A.A. v. Board of Regents of Univ. of Oklahoma, 104 S.Ct. 2948 (1984); Northern Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 105 S.Ct. 2613 (1985); and Smith v. Pro Football, Inc. 593 F.2d 942 (D.C. Cir. 1978).

Alternatively, petitioners urged the illegality of the restraints under the more extended rule of reason analysis. The restraints evolved from a consciously designed, persistent series of efforts to foreclose market access. Widespread exclusive dealing clauses already substantially impeding market entry. Parallel development of "carrier agent" restraints

by other major van lines further closed off market options. Anticompetitive effect was apparent in the immediate elimination of one fifth of the competitive carrier operations, as well as inhibition of the development of competitive operations by some firms throughout the 1979-82 period. Support for claimed trademark protection and consumer exposure propositions was lacking. There was no undisputed evidence of any net "free rider" effect, taking into account all benefits and burdens to contracting parties. Less restrictive alternatives to satisfy any of claimed legitimate commercial goals were apparent.

The petitioners urged that the restraints have clear output limiting tendencies. They prevent the free and flexible connections between the affected "carrier agents" and other household goods moving firms in the nation. They

restrict the flexible and efficient use of equipment. They prevent the use of local and regional market identities built up over time, at owner's expense, to attract consumers to potentially more efficient alternatives to existing van line services. All this tends to decrease the effectiveness of price competition and limit service options. And all these effects are contrary to the thrust of the 1980 legislation and the policy of the antitrust laws.

The District Court (Judge Oberdorfer) ruled for the defendants on cross motions for summary judgment, on grounds only partly relevant to the rationale of the Court of Appeals. 10/

10/ The District Court held that the agreement among household goods moving firms and Atlas officials on the Atlas Board of Directors constituted an intracorporate conspiracy exempted under Copperweld Corp. v. Independence Tube Corp, ___ U.S. ___, 104 S.Ct. 2731, 81 L.Ed.2 628 (1984) (App. 81a-96a) or

On appeal, Petitioners pointed out, inter alia, a variety of factual and legal errors. 11/

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alternatively that 49 U.S.C. § 10934 (d) exempted from the antitrust laws agreements between "agent" firms on a van line board of directors even when such agreements restricted the competitive carrier operations of the carrier agents on the board and other actual and potential carrier agents (App. 81a-89a, 96a-97a); that exclusive dealing contracts were essential to van line operations (App. 59a-60a); that the various incidents of the 1982 carrier agent policy were justified by a need to terminate "free riding" by carrier agents on Atlas (including assumed use of Atlas personnel and equipment in independent carrier operations) (App. 57a, 114a-115a) and by a need to avoid additional Atlas exposure to claims arising from independent carrier operations of carrier agents (App. 123a); that the restrictions on "carrier agent" competition were justified by a presumed gain in the vigor of competition among van lines (App. 122a-123a); and that since Atlas had the legal right to set up company stores which had no independent carrier operations and also would deal with no independent carriers, it was justified in requiring all independent firms contractually associated with it to abide by similar or less restrictive conditions (App. 118a-122a).

11/ E.g., the lack of any record support for the proposition that exclusive dealing contracts were essential for

The Court of Appeals corrected several District Court errors. In particular, it recognized the horizontal competitive relationships between the Atlas Board members, between those firms and other carrier agents, and between Atlas and the carrier operations of carrier agent firms. (App. 8a-9a). The Court of Appeals recognized that the Atlas/Board combination was an horizontal conspiracy, which used a group boycott mechanism to effectuate the restraints it devised. (App. 9a)

The appellate panel rejected use of the per se rule, and held the restraints lawful under the rule of reason on the

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van line operations, the lack of any factual, much less undisputed, basis for asserting that van line competition would be be made more keen by diminishing com petition from other, non-van line sources, and the Court's failure to reflect an Atlas Director's testimony specifically indicating that carrier agents did not use Atlas personnel and coordinating services in their independent operations.

basis that with an estimated market share of 6% (one of two alternative undisputed national market shares which the Opinion adopted without explanation), Atlas and its Directors could not restrict output, and therefore must have had some purpose other than competitive restraint. (App. 1a, 22a).

The Court of Appeals took no account of the prior-noted evidence concerning explicit motivations of the Atlas' Board market foreclosure effort, parallel exclusive dealing and "carrier-agent" policies, and loss of competitive carrier agent operations.

The Court of Appeals found one single, and in its opinion sufficient, justification for the carrier agent policy: termination of "free riding" by carrier agents. (App. 24a-25a), on bases detailed later herein.

To these two basic premises the

Circuit Court added a reinterpretation of Supreme Court precedent concerning horizontal restraints. It concluded that the Supreme Court had impliedly overruled United States v. Sealy Corp., 388 U.S. 350 (1967) and Topco Associates, Inc. v. United States, 405 U.S. 596 (1972) and had returned to the analysis of United States v. Addyston Pipe & Steel Co., 85 F.2d 271 (6th Cir. 1890; modified and aff'd 175 U.S. 211 (1899), as to restraints "ancillary" to a "contract integration". In the Court of Appeals' view the Supreme Court now is of the view that as to "ancillary" restraints there need be no weighing of procompetitive and anticompetitive effects. (App. 40a) The Court of Appeals' reasoning also precludes any search for less restrictive alternatives to any such restraint.

The plaintiffs petitioned for a rehearing en banc on July 3, 1986. The

petition did not get a majority vote, as indicated by order of August 7, 1986.

REASONS FOR GRANTING THE WRIT

1. A RULE THAT HORIZONTAL RESTRAINTS AMONG PARTIES HAVING LESS THAN A 10% MARKET SHARE CANNOT ADVERSELY AFFECT COMPETITION AND NO CONSIDERATION IS TO BE GIVEN TO OTHER MARKET CONDITIONS, PURPOSES OR APPARENT EFFECT, PRECLUDES PROPER APPLICATION OF BOTH THE PER SE RULE AND THE RULE OF REASON

The Court of Appeals properly held that the competitors on the board of directors of a common instrumentality had effected horizontal restraints on competition (App. 8a-9a) in creating Atlas' carrier-agent policies; and the restraints were given effect throughout the "Atlas system" (the moving firms under contract with Atlas) by requiring those firms to boycott any firm refusing to comply with the Atlas policy, and all the reorganized carrier operations (App.

9a). The Court's sole ground for finding a lack of any anticompetitive purpose or effect in these horizontal restraints is its assertion that "it is impossible to believe that an agreement to eliminate competition within a group of that size can produce any of the evils of monopoly" (App. 14a). The court reasoned that if a linked group of companies making up 6% of the market were to reduce their output, firms in the remaining 94% of the market would simply take over the abandoned business. (App. 14a). Apparently assuming that the restraints' proponents believed this proposition, the Court assumed that they must have had objectives other than restraint of competition

> "If it is clear that Atlas and its agents by eliminating competition among themselves are not attempting to restrict industry output, then their agreement must be designed to make the conduct of their business more efficient. No third possibiity suggests itself." (App. 22a).

On this basis the court concluded

that the "carrier-agent" restraints must have a procompetitive purpose and effect, and in the words of Chief Judge Wald's separate statement, warrant a determination of "per se legality" (Wald Statement, App. 42a, n. 2).

Precedent requires that a court first determine whether an allegedly illegal practice "...facially appears to be one that would always or almost always tend to restrict competition and decrease output...BMI, supra, at 19; and "...so often 'lack ...any redeeming virtue ... that they are conclusively presumed illegal..." BMI, supra, at 8. If this is found the practice is deemed illegal per se. Price fixing agreements and territorial allocations have historically been so treated. E.g., Arizona v. Maricopa County Medical Society, 457 U.S. 332, 344 (1982), Topco, supra.

After a period in which this Court

treated a wide variety of group boycotts as per se unlawful (e.g., Eastern States Retail Lumber Ass'n. v. United States, 234 U.S. 600, 34 LS.Ct. 951, 58 L.Ed. 1490 (1914), Associated Press, Klors, Fashion Originators, supra) this and lower courts have sought to differentiate between collective refusals to deal apparently targeting competition or otherwise clearly likely unreasonably to retrain competition, and those which might be related to productive undertaking in such a way as to require more discriminating analyses under the rule of reason. Courts have continued to hold per se unlawful any " ... concerted attempt by a group of competitors to protect themselves from competition from non-group members who seek to compete at that level by depriv(ing) would-be competitors of a trade relationship which they need to enter (or survive in) the level

where the group operates." Smith v. Pro Football, 593 F.2d 1173, 1178 (D.C. Cir. 1978). A similar standard was adopted by this Court in Northern Wholesale Stationery, supra, when it stated that the per se rule applies to group boycotts denying "access to a supply, facility, or market necessary to enable the boycotted firm to compete..." (at 2619)). See for a reasonably discriminate discussion of categories of group boycott activities E.A. McQuade Tours, Inc. v. Consolidated Tour Manual Committee, 467 F.2d 178, 186, 187 (5th Cir. 1972).

Both the presence of market power and apparent foreclosure of price and product offers have been used as discriminators in determining the applicability of the per se rule. As stated in NCAA: "As a matter of law, the absence of proof of market power does not justify a naked

restraint on price or output" (at 109). On the other hand, the apparent existence and use of market power is an obvious indication of anticompetitive purpose and effect.

If the per se rule is not applied and a rule of reason analysis is required "...the fact finder weighs all the circumstances of the case...(including) the facts peculiar to the business in which the restraint was imposed, the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist ... the purpose and end sought... Continental T.V., Inc. v. G.T.E. Sylvania, Inc., 333 U.S. 36, 49 (1976). See also Nat. Soc. Professional Enginers v. United States, 435 U.S. 679, 692 (1978) "...competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons

why it was imposed."

In this inquiry, the courts are to "focus directly on the restraint's impact on competitive conditions." Professional Engineers, supra at 188.

In both per se and rule of reason analyses, the Court historically has not been solely concerned with whether monopolization was imminent, but rather has inquired whether the examined restraints "deprive the public of the advantages which flow from free competition." Fashion Originators Guild, at 486. (See also Judge Stevens' observation in B.M.I., "It is often the case that an agreement among competitors will not serve to eliminate competition forever, but only to delay the appearance, or to increase the costs of new entry." (B.M.I., supra, at 36).

Thus in horizontal restraint cases, there has generally been no requirement

of proof of monopoly position or iminent danger of such. Rather, as indicated this year by this Court in Federal Trade Commission v. Indiana Federation of Dentists, CCH Trade Cases 1986-1, ¶ 67, 117, 476 U.S.____ 90 L.Ed.2d 445, 106 S.Ct. ___ (June 2, 1986), a group boycott among competitors should be struck down under the rule of reason without any specific showing of market share or market power if an anticompetitive purpose is apparent and there is visible interference with independent offer and acceptance of terms of sale, accompanied by little procompetitive justification. Likewise, in NCAA, this Court made no market share findings, but could discern a clear collective limitation on the available range of price and supply options. Some lower courts have taken the same approach. See General Leaseways v. National Driver Leasing, 744 F.2d 588 (7th Cir. 1984),

where the circuit court found several forms of competition with a nationally integrated network of truck leasing firms, determined no specific market share for it, and went on to observe, in striking down a territorial allocation, "the association, with all the competition it does face, is not a powerful cartel" (at 597) but "it does have the power to restrain trade substantially" (at 596).

In this case, the Court of Appeals pivoted its decision on a market power analysis based solely on the market share of the immediate participants in the restraint -- Atlas, the "agent" and the "carrier-agent" firms. In asessing market power the court failed to take into account the parallel use of exclusive dealing clases by other major van lines, a practice adopted by these lines in a period of cartelization prior to the

1980 deregulation legislation. Nor did it consider the parallel "carrier-agent" restraints which promised to shut off access within other van line groupings of "agent" firms.

The parallel use of such similar restraints foreclosed the bulk of the interstate market to those under contract with Atlas and raised entry barriers to those who might initiate competition with Atlas and other major van lines. Parallel use of such restraints also facilitates collusion among major van lines. Thus the presence of these similar restraints was the source of Atlas' power in the market. Failure to take them into account is inconsistent with this Court's decision in Standard Oil v. United States, 337 U.S. 293 (1949). See also United States Department of Justice, Vertical Restraints Guidelines, §§ 3.2, 3.3 (1985), reprinted

in 5 CCH Trade Reg. Rep. ¶ 50, 473. The Court of Appeals gave no weight to the cumulative effect of these restraints. The Court's mode of analysis also excluded from view the many indications of anticompetitive purpose and effect apparent in this record, recited earlier in this Petition,12/

Courts have in recent years increasingly referred to the formal arguments of the economic discipline. This generally healthy development can be

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12/ These indications of anticompetitive purpose and effect included the obvious desire of the movers on Atlas' Board to fend off increased competition resulting from the legislative reduction of restraints on entry, their explicit fear of increased price competition, the Board's experimentation with several approaches to forfend increased competition, their apparent trade-derived knowledge that foreclosing access to those distant competitions not already foreclosed by other van liens exclusive dealing clauses would have substantail coercive effect, and the prompt sacrifice of any competitive operations by one fifth of the carrier agent firms targeted.

harmful when these powerful analytic tools are misused, or extended beyond their current capabilities. The Court of Appeals truncated form of market analysis would powerfully and pervasively limit the reach of the antitrust laws. If no acount is to be taken of surrounding market conditions when the direct participants in and victims of a restraint have less than a monopoly-threatening market share among themselves, antitrust analysis will undoubtedly be simplified. But the way will be open for competitors to exercise their ingenuity to create a host of market deadening accords.

The mode of analysis adopted in this case conflicts sharply with the approaches adopted in Indiana Dentists, and NCAA, supra and a recent important Seventh Circuit case, General Leaseways, supra. These conflicts require authoritative resolution.

This Court's review is also appropriate because the stark presumption of lawfullness adopted below, in precluding any consideration of anticompetitive effects, also fails to require examination or less-restrictive alternatives, as noted below.

2. THE COURT OF APPEALS OPINION PURPORTS TO OVERRULE ESTABLISHED RULE OF REASON REQUIREMENTS THAT A RESTRAINT'S PROCOMPETITIVE AND ANTICOMPETITIVE EFFECTS BE WEIGHED, AND LEAST RESTRICTIVE ALTERNATIVES BE UTILIZED.

In holding that BMI, NCAA and Northern Stationery have overruled Topco and Sealy, supra the Court of Appeals constructed a form of ancillary restraint analysis inconsistent with this Court's prior holdings, and well settled law concerning the necessity of constraining anticompetitive accords to the minimum dimensions reasonably necessary for productive economic undertakings.

As early as 1873, this Court stated

as to claimed "ancillary" restraints "... the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made." Oregon Steam Navigation Co. v. Winsor, 87 U.S. 64, 66, 67 (1873). In Addyston, Judge Taft repeated that for a competition-limiting restraint to be upheld it must be found "reasonably necessary" to the legitimate economic integration presented (at 281).

Inherent in this logic, and central to it, is recognition that a restraint is not "reasonably necessary" if the same end can be secured through less restrictive means. This logic has evolved into well recognized "least restrictive alternative" analyses, perhaps best recently summarized by Kreuzer v. American Academy of Periodontology, 735 F.2d 1479, 1494-95 (D.C. Cir. 1984) to the effect that when legitimate commercial

objectives are advanced to justify a restraint of competition " ... it must be shown that the means chosen to achieve that end are the least restrictive available." See also United States v. Realty Multi-List, Inc. 629 F.2d 1351, 1375 (5th Cir 1981). See generally VII Areeda, Antitrust Law § 1505 (1981).

Allied to this is the requirement that when a restraint has procompetitive justification. "... the anticompetitive role of the challenged practice must be carefully balanced aginst its 'procompetitive virtue' to ascertain whether the former outweigh the latter." Smith v. Pro Football, Inc., supra, at 1178. See also National Bancard Corp v. Visa USA, 779 F.2d 592, 601, 603,(11th Cir 1986).

The Court of Appeals decision is not in accord with these decisions. The Court of Appeals reasoned that an "agreement (among competitors) eliminating com-

petition ... subordinate and collateral to a separate, legitimate transaction in the sense that it serves to make the main transaction more effective" (App. 29a) is to be deemed an "ancillary" restraint. It then notes that the territorial allocations in Topco could be considered subordinate and collateral to the creation of the private label brands there created, and could therefore have been considered ancillary restraints (App. 31a), but were nonetheless struck down as per se illegal (App. 30a-32a). The Court concluded that if Topco is now the law, the Atlas restraints are per se illegal. (App. 32a)

The Court of Appeals avoided that result by determining that B.M.I., supra, overrules Topco, supra. Noting that in BMI, horizontal price restraints were related to creating a group licensing mechanism, it excerpted that portion of

the BMI opinion which states "We would not expect that any market arrangements reasonably necessary to effectuate the rights that are granted would be a per se violation of the Sherman Act."

The Court then sought to draw a parallell to the instant case.

> "Atlas is not in a position to conduct all of the carriage involved itself. The restraints it imposes are reasonably necessary to the business it is authorized to conduct. One may quibble about whether the ASCAP blanket license is more necessary to the conduct of that business than the agent exclusivity arrangement is to the conduct of Atlas' business. We do not believe, however, that in choosing the words it did, the Supreme Court intended that the lower courts should calibrate degrees of reasonable necessity". (App 36a).12/

12/ The Court imputed "redeeming competitive virtures" to the major van lines' parallel use of exclusive dealing clauses from the fact that such practices are customary (App. 34a); and from a Senate report's explaining Congressional refusal to grant antitrust immunity to exclusive dealing contracts on the basis that the antitrust laws do not (necessarily or automatically) condemn such contracts.

Thus, in the view of this Court of Appeals, if a restraint is arguably "reasonably necessary" to a contract integration, this Supreme Court has held that the courts are not to examine degrees of necessity, or alternative means of addressing any legitimate goals.13/ Nor, as the Court of Appeals explains, should courts consider whether

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The Court took no cognizance of the fact that such arrangements were entered into in a period of regulatory cartelization, where they complemented collective pricing and various regulatory rules in a concerted suppression of competition. Nor did the Court consider the cumulative effect of these restraints in limiting market access and raising entry costs in the post-1980 era. And the Court did not examine the interaction of such contracts and the additional restraints imposed in the Atlas Board's "carrier-agent policy."

13/ Though the Court of Appeals began this portion of its opinion with a recital of language to the effect that restraints may not be unnecessarily broad (App. 29a), in following the line of logic traced above it undertook no analysis of whether Atlas' carrier agent policy was unnecessarily broad, and as noted above ended in rejecting such an analysis.

procompetitive effects are more than offset by anticompetitive effects.

> "Second, though it is sometimes said that, in the case of restraints like these, it is necessary to weigh procompetitive effects against anticompetitive effects, we do not think that is a usable formula if it implies an ability to quantify the two effects and compare the values found. ... If the underlying contract integration is lawful, i.e. not of such a size as to violate the Sherman Act, restraints ancillary to the integration, in the sense we have described, should be lawful". (App. 40a, n. 11).

The Circuit Court has turned BMI on its head. In BMI the Court considered a joint marketing, or common agency, device which had greatly reduced the cost of mass marketing musical compositions. The majority there apparently believed some unification of pricing within the marketing mechanism was necessary. The joint marketing mechanism had previously been limited in scope by consent decree requirements that neither the suppliers nor the buyers of musical compositions

would be subject to exclusive dealing restraints. 15/ Even so, the Court remanded the case to the Court of Appeals with instructions that it should be subjected to a "discriminating examination under the rule of reason", noting that the particular practices employed might not survive that examination (at 24).

Nothing in BMI suggests that the Court has dispensed with the need to evaluate less restrictive alternatives, or weigh anticompetitive against procompetitive effects. This is made clear by

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15/ The Court of Appeals has thus drawn an inapposite fact parallel. In BMI, the creation of the joint marketing agency corresponds to the creation of Atlas as a joint agent for the carrier agents and other moving and storage firms. In BMI additional restraints such as exclusivity requirements had been abandoned, and that was taken by this Court to indicate some likelihood that the core integration was not, as modified, excessively broad. In this case, it is the extension of the core integration by means of exclusive dealing arrangements and additional restraints which is at issue.

the Court's subsequent opinion in Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982), where the Court found the restraint in question unjustified in large part because the proffered efficiency justification could have been achieved in a less restrictive way. See also National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984).

The Court of Appeals method of analysis converts the BMI injunction that degrees or types of claimed reasonable necessity be given discriminating examination into a carte blanche for any restraint claimed to be subsidiary and collateral to a contractual integration which itself is "not of a size" to violate the Sherman Act.

By characterizing restraints claimed to be "ancillary" to a "contract integration" prior to rather than after a deter-

mination whether the restraints are unnecessarily broad, the appellate panel's opinion would curtail the reach of the antitrust laws in scarcely less sweeping a fashion than that achieved by its mode of market analysis. When the two lines of logic are combined, little short of outright monopolization or "naked" price fixing and territorial allocation would seem proscribed. A trade restraint justified by associated with some form of "contractual integration" would, absent a monopoly position among the proponents, seem largely exempt from challenge. Such a major change in antitrust analysis should be reviewed by this Court.

The unwillingness to consider less restrictive alternatives becomes particularly important where, as here, several alternative approaches might be used to deal with the type of justification advanced for the restraint.

3. SUSTAINING A "FREE RIDER" JUSTIFICATION ON MOTION FOR SUMMARY JUDGMENT MERELY ON FINDING OF SOME BENEFITS TO A CLASS OF POTENTIAL COMPETITORS, WITHOUT TAKING ACCOUNT OF RECIPROCAL BENEFITS TO THE PARTIES IMPOSING THE RESTRAINTS, A PRICE MECHANISM FOR EQUILIBRATING BENEFITS AND BURDENS, AND FACTUAL DISPUTE AS TO NET BENEFIT AND BURDEN, WOULD PROLIFERATE SPURIOUS FREE-RIDER CLAIMS.

This Court has recognized the potential applicability of the "free rider" market imperfection as a justification for trade restraint. E.g., Continental T.V., Inc., supra, at 55, citing Posner, Economic Analysis and Law, Brown & Co., 1971, at 285. However, this Court has not articulated a standard for judging free rider justification claims.

None of the justifications which Atlas advanced when it published its carrier agent policy (PSGI 54) clearly asserted that Atlas sought to terminate free riding. Petitioners contested these various Atlas justifications. As to claimed benefits of affiliation with

Atlas, Petitioners had discriminately granted some claimed benefits and disputed others. (PSGI 25-29, and attachments)

The Court of Appeals in effect reduced and transformed various justications for the "carrier agent" restraints, contested at the District Court level, into one: termination of "free riding" by independent carrier operations on advantages of agent affiliation with Atlas. (App. 5a) The opinion appears to adopt Atlas' arguments that Atlas would incur increased liabilities from independent carrier operations, though petitioners had shown that such liabilities had historically been miniscule, as to firms supplying 35% of Atlas' revenues. It also seemed to adopt the contested Atlas suggestion that independent carrier operations would utilize Atlas facilities, notwithstanding defendants'

own statement of facts and other prior cited materials which negate the possibility that "agents" would in their independent operations use Atlas facilities to any appreciable extent.

The Circuit Court found (App. 23a-25a) that the plaintiffs "could not seriously contend that the carrier agents' association with Atlas did not provide them with benefits that benefitted them in conducting business in competition with Atlas". The specifics used by the court were "intangible" benefits -- association with Atlas "national image", exposure to "national accounts" at Atlas sales meetings, and superior services from Atlas affiliates from Atlas training of their employees.

This sort of free riding analysis fails in taking no account of undisputed evidence showing substantial countervailing benefits to Atlas from its asso-

ciation with the carrier agents. The analysis also fails to take into account the availability of pricing mechanisms which compensate Atlas for its core services and which are or can be used to provide Atlas compensation for its supplementary (driver training, sales aids, sales convention) services. And the availability of alternative means of preventing any potential free riding is not addressed.

Plaintiffs showed that Atlas was formed in part by "carrier agents". A claim of free riding is belied by the "carrier agents" disproportionate contribution of bookings and hauling capacity for Atlas registered shipments. Atlas' market presence and reputation is necessarily derived in part from the market identities built in local and intrastate operations by agents and "carrier agents," and by their performance of the

physical aspects of the interstate movements. Atlas officers were acutely aware that Atlas gained substantially from the name-recognition goodwill generated by such local and regional companies, in their own operations -- including local, intrastate, and interstate operations. (PSGI 58 and Atlas President Bland's statement, supra.) Atlas has not contended and cannot contend that it has in any direct or traceable way compensated the carrier agents for this goodwill. Indeed, Atlas made forced contribution of the commercial reputations of the carrier agents exclusively to Atlas a cornerstone of its carrier agent policy, reflecting the major market value of this asset. 16/

16/ That Atlas attempt to appropriate the market value of these assets to itself by means of collective restraints denying independent use of the assets, rather than purchasing the carrier agent firms and paying the unrestrained market value

Thus, in the net, Atlas and the carrier agents mutually exchanged both tangible and intangible, priced and unpriced benefits. In taking account of only one side of the exchange of "intangible" benefits, the Court of Appeals made a fundamental error, of considerable precedential importance.

Practical limitations on explicit, detailed pricing of all components of often-complex business relationships allow scope for "free rider" claims in a vast variety of situations. Such claims must be given strict scrutiny E.g., General Leaseways, supra. A form of analysis which sustains "free rider" justifications for trade restraint upon showing some benefits to a contracting party which are not explicitly compen-

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of this asset, is one indicator of the unreasonable nature of the Atlas restraints.

sated, without regard to benefits flowing the other way, and without regard to alternative means of controlling "free rider" effects, incorporates a bias permitting an enormous variety of unnecessarily broad trade restraints arguably attendant to "contract integrations."

CONCLUSION

Rarely does a Court of Appeals combine three distinct forms of analytic error which have a common and major precedential effect -- substantial abridgment of the scope of the antitrust laws.

A rule that group boycotts clearly targeting horizontal competition are to be *per se* legal should less than 10% of a national market be directly restrained contradicts precedent and should surely be reviewed by this Court. A reinterpretation of the fundamental ancillary restraints doctrine which omits tests of reasonable necessity is hardly less con-

sequential or less demanding of review. And counting "free-rider" effects in only one direction would afford spurious justification for hosts of trade restraints.

All these errors prejudice the emergence of competition in a trade sector long cartelized by now-discarded regulations, and if not corrected will have mischevious effects throughout the economy in the decades ahead.

Respectfully submitted,

C. Jack Pearce

86-734

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ROTHERY STORAGE & VAN CO., INC., *et al.*,
Petitioners,

v.

ATLAS VAN LINES, INC.,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5845

ROTHERY STORAGE & VAN CO., et al., APPELLANTS

v.

ATLAS VAN LINES, INC.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 83-00450)

Argued October 16, 1985

Decided June 3, 1986

C. Jack Pearce, with whom *Timothy J. Shearer* was on the brief for appellants.

James vanR. Springer, with whom *R. Bruce Holcomb* was on the brief for appellee.

Before: WALD, GINSBURG and BORK, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* BORK.

Concurring Opinion filed by *Circuit Judge* WALD.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

BORK, *Circuit Judge*: Appellants, plaintiffs below, seek review of the district court's decision dismissing their antitrust action against Atlas Van Lines, Inc. ("Atlas"). *See Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 597 F. Supp. 217 (D.D.C. 1984). Appellants are five present and three former agents of Atlas. For convenience, we will frequently refer to them by the name of the first-named appellant, Rothery Storage & Van Co. ("Rothery"). Rothery claims that Atlas and several of the carrier agents affiliated with Atlas adopted a policy constituting a "group boycott" in violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), which prohibits "[e]very contract, combination . . . or conspiracy . . . in restraint of trade." The trial court granted Atlas' motion for summary judgment on several alternative grounds. *See infra* pp. 6-7. Because we find that Atlas' policy is designed to make the van line more efficient rather than to decrease the output of its services and raise rates, we affirm.

I.

Atlas operates as a nationwide common carrier of used household goods under authority granted by the Interstate Commerce Commission. It contracts to provide moving services to individuals and to businesses transferring employees. Like most national moving companies, Atlas exercises its interstate authority by employing independent moving companies throughout the country as its agents. These companies execute a standard agency contract with Atlas, agreeing to adhere, when making shipments on Atlas' authority, to such things as standard operating procedures, maintenance and painting specifications, and uniform rates. Typically, such an agreement will contain a provision barring an agent affiliated with a particular van line from dealing with any other line. The agency agreement is supplemented by Atlas' bylaws, rules, and regulations governing the agents' interstate operations.

Some of these independent moving companies, the "non-carrier agents," have no interstate authority of their own and can move goods interstate only on Atlas' authority. Until recently, other companies, the "carrier agents," possessed their own interstate authority and could move goods to the extent of that independent authority as principals for their own accounts. Both types of agent may engage in intrastate carriage without Atlas' permission or governance. A carrier agent, however, could act in interstate commerce both as an agent of the van line it serves and as a competitor of that van line. The carrier agents could, and some did, use Atlas equipment, training, and the like for interstate carriage under their own authorities and pay Atlas nothing.

A van line and its agents constitute an enterprise on a scale not easily obtainable by a single carrier. Atlas, which is the sixth largest van line in the nation, provides a network of 490 agents capable of carrying household goods between any two points in the nation. Atlas coordinates and supports the agents' operations. The use of agents spares a van line the necessity of obtaining enormous amounts of capital to perform the same services and, quite possibly, avoids diseconomies of scale, *i.e.*, the inefficiencies of a single management large and complex enough to perform all the functions that are now divided between the van line and its agents. The agents find customers and do the packing, loading, hauling, and storage. Atlas sets the rates, dispatches shipments, chooses routes, arranges backhauls so the agent's truck need not return empty, arranges services at the origin and destination of shipments, collects all revenues and pays the agents, establishes uniform rules for the appearance and quality of equipment, trains salespeople and drivers, purchases and finances equipment for use by the agents, and maintains insurance on all shipments made under Atlas' authority. In addition, Atlas conducts national advertising and promotional forums. With the assistance of agents, it handles customer claims. In

short, Atlas, and its agents make up an enterprise or firm intergrated by contracts, one which is indistinguishable in economic analysis from a complex partnership.

The ability of the carrier agents to exercise their independent authority traditionally has been governed by "pooling agreements" that dictate the business relationship between a van line and a carrier agent affiliated with it. The van line could, of course, set the rates at which its agents carried goods on its authority. ICC regulations required that carrier agents use the same rates as their van line principal when carrying shipments under independent authority. Because the relationship between a carrier agent and a van line constitutes an agreement between competitors, Congress provided antitrust immunity for any such relationship governed by a pooling agreement approved by the ICC. *See* 49 U.S.C. §§ 11341-11342 (1982). In 49 U.S.C. § 10934(d) (1982), Congress also allowed agents to sit on the boards of their van lines without antitrust liability.

The deregulation of the moving industry, beginning in 1979, produced changes that had a profound impact on the relationship between van lines and their agents. Prior to the regulatory changes, independent moving companies had little ability to obtain their own interstate transportation authority. The ICC's Policy Statement on Motor Carrier Regulation, 44 Fed. Reg. 60,296 (1979), and the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, greatly increased the ability of common carriers to obtain interstate moving authority. In 1981, moreover, the ICC repealed its requirement that carrier agents charge the same rate for agency shipments and shipments carried on their own accounts. *See North American Van Lines, Inc.* v. *ICC*, 666 F.2d 1087, 1094-96 (7th Cir. 1981). Thus, agents could obtain interstate authority and could cut prices to attract business for their own accounts that otherwise might have constituted agency shipments for the van line's account.

This increased potential for the diversion of interstate business to its carrier agents posed two potential problems for Atlas. Each of these problems is a version of what has been called the "free ride." A free ride occurs when one party to an arrangement reaps benefits for which another party pays, though that transfer of wealth is not part of the agreement between them. The free ride can become a serious problem for a partnership or joint venture because the party that provides capital and services without receiving compensation has a strong incentive to provide less, thus rendering the common enterprise less effective. The first problem occurs because, by statute, a van line incurs strict liability for acts of its agents exercising "actual or apparent authority." 49 U.S.C. § 10934(a) (1982). Thus, an increase of shipments made on the agents' independent authority, but using Atlas' equipment, uniforms, and services would create the risk of increased liability for Atlas although Atlas received no revenue from those shipments. Second, because carrier agents could utilize Atlas services and equipment on non-Atlas interstate shipments, the possible increase of such shipments meant that Atlas might make large outlays for which it received no return. We return to the free-ride problem in Part IV of this opinion.

To meet these problems, Atlas could have amended its pooling agreement to redefine the terms on which it allowed its carrier agents to compete with the principal company. Had Atlas chosen this course and obtained ICC approval of its amended pooling agreement, the new agreement would have enjoyed antitrust immunity under 49 U.S.C. §§ 11341-11342 (1982). Instead, on February 11, 1982, Atlas announced that it would exercise its statutory right to cancel its pooling agreement and would terminate the agency contract of any affiliated company that persisted in handling interstate carriage on its own account as well as for Atlas. Under the new policy, any carrier agent already affiliated with Atlas could continue to exercise independent interstate authority only by

transferring its independent interstate authority to a separate corporation with a new name. These new entities could not use the facilities or services of Atlas or any of its affiliates.

II.

Because Atlas and its affiliates refuse to deal with any carrier agent that does not comply, several Atlas carrier agents, appellants here, charged that Atlas' new policy constitutes a "group boycott." They filed this action, and after the completion of discovery on the issue of liability, both sides filed cross motions for summary judgment.

The district court granted summary judgment to Atlas on alternative grounds. First, relying on *Copperweld Corp.* v. *Independence Tube Corp.*, 104 S. Ct. 2731, 2741 n.15 (1984), the court held that, because the challenged policy was promulgated by Atlas' board of directors, the plurality of actors essential to a finding of conspiracy did not exist. *See* 597 F. Supp. at 225. The court rejected Rothery's argument that *Copperweld* did not apply because some of the directors represented carrier agents and, therefore, might have a separate interst in adopting the new policy. *See id.* at 227-29; *see also Greenville Publishing Co.* v. *Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974) (stating that when a corporation's officers have an "independent personal stake in achieving the corporation's illegal objective," it constitutes an exception to the rule that a corporation cannot conspire with its own officers) (citations omitted).

Second, the court rested on 49 U.S.C. § 10934(d)(4) (1982), which provides antitrust immunity for "discussions or agreements between a motor common carrier . . . and its agents . . . related solely to . . . ownership of a motor common carrier . . . by an agent or membership on the board of directors of any such motor common carrier by an agent." *See* 597 F. Supp. at 226. Because the "[d]iscussions, voting, and agreement" leading up to the challenged policy involves the terms under which Atlas

agents themselves can own independent motor common carriers in interstate service, the court found that policy immune from antitrust liability. *See id.* at 227-28.

The court's third reason went to the merits of the antitrust claim. In the absence of " '[c]onsiderable' and 'unambiguous' " experience with relationships between carrier agents and van lines and the impact of deregulation on those relationships, the court declined to treat the Atlas policy as illegal per se. *See* 597 F. Supp. at 231. Shifting to a rule-of-reason analysis, the court held that Atlas acted reasonably in adopting a policy that ended the carrier agents' ability to benefit from the "diversion" of Atlas' "business infrastructure" to shipments made on their own accounts. *See id.* at 233. The court found it significant that Atlas adopted the less restrictive alternative of forcing affiliated carrier agents to exercise their independent authority through a separate company, rather than prohibiting any exercise of such authority by carrier agents. *See id.* at 234. The court also noted that any reduction in competition between Atlas and its carrier agents had to be weighed against procompetitive effects the new policy would have on inter-brand competition. *See id.* at 235.

While we do not agree that the challenged arrangement lacks the elements of a horizontal agreement, we uphold the trial judge's conclusion that Atlas' new policy does not offend the antitrust laws. The challenged restraint is ancillary to the economic integration of Atlas and its agents so that the rule of per se illegality does not apply. Neither are the other tests of the rule of reason offended since Atlas' market share is far too small for the restraint to threaten competition or to have been intended to do so. Because the reasonableness of the restraint is so clear, we do not reach the question of whether the challenged arrangement falls within the statutory exemption from antitrust liability contained in 49 U.S.C. § 10934(d) (1982).

III.

Before turning to considerations we think dispositive, we deal with arguments that Atlas and Rothery each consider decisive. Atlas contends that there is no agreement between actual or potential competitors and hence no violation of section 1 of the Sherman Act. Rothery argues that Atlas' policy constitutes a boycott that is per se illegal. We think neither argument well-founded.

A.

Section 1 of the Sherman Act condemns only those restraints of trade achieved by contracts, combinations, or conspiracies. Thus, only agreements between legally separate entities are covered. The argument that the Atlas board of directors was incapable of conspiring for Sherman Act purposes depends on the legal principle, laid down in *Copperweld Corp.* v. *Independence Tube Corp.*, 104 S. Ct. 2731 (1984), that an agreement within a single enterprise is not an agreement contemplated by the Act. That principle is inapplicable here.

When the Atlas policy challenged in this case went into effect, every agent in the system was an actual or potential competitor of Atlas. The carrier agents were actual competitors and the non-carrier agents, because of the ICC's increased willingness to grant interstate moving authority, were potential competitors. Every carrier that stayed in the Atlas network adhered to a policy of ending or lessening its competition with Atlas (by abandoning its interstate authority or transferring that authority to a separae company with a new trade name) or of not entering into full competition with Atlas (by not obtaining interstate authority). Agents required to ship on Atlas' interstate authority must, of course, abide by Atlas' rates. Thus, all of these legally separate corporations agreed to a policy that restricted competition.

The Supreme Court dealt with an analogous arrangement in *National Collegiate Athletic Association v. Board*

of Regents, 104 S. Ct. 2948 (1984) (*"NCAA"*). In order to remain members of the NCAA in good standing, universities had to adhere to the NCAA's policy with respect to the televising of football games. The Court said:

> By participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created a horizontal restraint —an agreement among competitors on the way in which they will compete with one another.

Id. at 2959 (footnote omitted). That reasoning controls here.

If it is deemed important, it may be noted that the Atlas Board of Directors consisted of actual or potential competitors of Atlas and that is also sufficient to take this case out of the *Copperweld* rule. *See United States* v. *Sealy Corp.*, 388 U.S. 350 (1967); *see also Topco Associates, Inc.* v. *United States*, 405 U.S. 596 (1972). The two non-carrier agents represented on the eleven-person Board when Atlas adopted the policy were capable of competing by acquiring interstate authority. The four carrier agents represented on the Board at the time were actual competitors of Atlas. Three of the remaining members of the board were officers of Atlas. Thus, all but two members of the board represented separate legal entities that competed in interstate commerce. This brings the case within the rule of *Sealy* and *Topco* and shows the existence of a horizontal restraint. That conclusion does not mean, however, that the restraint is illegal.

B.

Since the restraint on competition within the Atlas system involves an agreement not to deal with those who do not comply with Atlas' policy, and so may be characterized as a boycott, or a concerted refusal to deal, Rothery contends that Supreme Court decisions require

a holding of per se illegality. It cannot be denied that the Court has often enunciated that broad proposition. *See, e.g., Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 344 n.15 (1982); *Klor's, Inc.* v. *Broadway-Hale Stores*, 359 U.S. 207, 212 (1959); *Northern Pacific R.R.* v. *United States*, 356 U.S. 1, 5 (1958); *Fashion Originators' Guild of America* v. *FTC*, 312 U.S. 457, 468 (1941). Other cases, such as *Associated Press* v. *United States*, 326 U.S. 1 (1945), seem to indicate that not even the presence of a joint venture or economic integration to which the agreement against competition is ancillary can save a boycott from per se illegality.

Despite the seeming inflexibility of the rule as enunciated by the Court, it has always been clear that boycotts are not, and cannot ever be, per se illegal. To apply so rigid and simplistic an approach would be to destroy many common and entirely beneficial business arrangements. As one commentator put it, "[a]ll agreements to deal on specified terms mean refusal to deal on other terms," and the literal application of per se illegality to any situation involving a concerted refusal to deal would mean in practical effect "that every restraint is illegal." *See* Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections and the Klor's Case*, 45 Va. L. Rev. 1165, 1172 (1959). For that reason, "any comprehensible per se rule for [group] boycotts . . . is out of the question." *Id.* at 1173.[1] Lower courts have

[1] The truth of this may be easily demonstrated. When a law firm refuses to hire an applicant there is a concerted refusal to deal since the lawyers in the firm are separate legal entities and capable of practicing law independently. It is also a boycott if the Ivy League refuses to admit a new college to membership or the American League refuses to admit a baseball team. It is no less a boycott if any of these groups refuses to deal because the applicant's grades are too low, or its football program has standards unacceptable to the Ivy League, or the would-be baseball franchise is currently a slow-pitch softball team in an industrial league. A ruling

long agreed with that assessment. *See Phil Tolkan Datsun, Inc.* v. *Greater Milwaukee Datsun Dealers' Advertising Association*, 672 F.2d 1280 (7th Cir. 1982) (excluding an auto dealer from membership in an advertising association lacking market power did not constitute a per se violation of section 1 of the Sherman Act); *United States Trotting Association* v. *United States*, 665 F.2d 781 (7th Cir. 1981) (*en banc*) (finding that it was not per se unlawful for an organization of rival harness racing operations to prevent free riding on its informational and standard-promulgation services by sanctioning members who allowed their horses to participate in events sponsored by non-affiliates of the organization); *United States* v. *Realty Multi-List*, 629 F.2d 1351 (5th Cir. 1980) (refusing to apply the per se rule where membership requirements had served to foreclose plaintiff from participating with rival realtors in a service providing multiple listing of properties); *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978) (eschewing a per se approach in a challenge to the NFL player draft because of a lack of "purpose to exclude competition"); *E.A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Committee*, 467 F.2d 178 (5th Cir. 1972) (rejecting per se analysis of the refusal of airlines to list plaintiff air tour operator in air tour manual after plaintiff failed to meet listing criteria), *cert. denied*, 409 U.S. 1109 (1973); *Deesen* v. *Professional Golfers' Association*, 358 F.2d 165 (9th Cir.) (upholding the exclusion of a professional golfer with poor scores from tournament

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that concerted refusals to deal are per se illegal would mean that Atlas not only must retain carrier agents that compete with it but must admit as an agent any trucker who applied regardless of the need for an additional agent, the trucker's financial condition, its safety record, or its ability to serve customers. That is what a per se rule means: no group may impose a standard of any kind as a condition of dealing. That nonsensical requirement would destroy all of the groups concerned or force them into one ownership in order to claim the immunity of the *Copperweld* rule.

participation), *cert. denied*, 385 U.S. 846 (1966); *Molinas* v. *National Basketball Association*, 190 F. Supp. 241 (S.D.N.Y. 1961) (holding that a league could adopt and enforce a rule prohibiting any of its teams from employing a player suspended for gambling).[2]

The Supreme Court has now made explicit what had always been understood. In *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 105 S. Ct. 2613 (1985), the plaintiff, a stationer, challenged as per se illegal its expulsion from a wholesale purchasing cooperative for violating the group's bylaws. The

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[2] *Accord* Brenner v. World Boxing Council, 675 F.2d 445, 455 (2d Cir.) (suspension of a fight promoter from promoting World Boxing Council fights for "failure to comply with his commitments") (applying the rule of reason unless the restraint at issue can "serve no purpose beyond the stifling of competition), *cert. denied*, 459 U.S. 835 (1982); Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614, 619 (9th Cir. 1979) (cancellation of newspaper advertising by those who had received unfavorable coverage by that newspaper) (holding that the rule of reason applies "[w]here an agreement between competitors 'having a primary purpose and direct effect of accomplishing a legitimate business objective is also alleged to have had an incidental and indirect adverse effect upon the business of some competitors' "), *cert. denied*, 447 U.S. 906 (1980). The rationales employed have varied, with some cases relying upon recent Supreme Court precedent concerning the per se rule, *see, e.g., Realty Multi-List*, 629 F.2d at 1367; *see also* Part V-C *infra* at pp. 33-41, some relying upon the dicta in Silver v. New York Stock Exchange, 373 U.S. 341, 348-49 (1963), to the effect that a group boycott may be justified by reference to the policies of another federal statute "or otherwise," *see, e.g., Brenner*, 675 F.2d at 454. and some relying upon both rationales, *see, e.g., Phil Tolkan Datsun*, 672 F.2d at 1284-87. The proposition that not all concerted refusals to deal are to be treated as per se illegal has found considerable support among commentators as well. *See, e.g.*, L. Sullivan, *Antitrust* § 89, at 253-56 (1977); 2 J. Von Kalinowski, *Antitrust Laws and Trade Regulation* § 6C.02[2], at 6C-25 to 6C-27 & n.68 (1986); Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 Colum. L. Rev. 685 (1979).

Court said that "not all concerted refusals to deal should be accorded *per se* treatment." *Id.* at 2621. We analyze *Pacific Stationery* below at somewhat greater length. *See infra* pp. 38-39. It is sufficient for present purposes to note that appellants' contention about the per se illegality of all boycotts has now been squarely rejected by the Supreme Court.

IV.

Appellants contend, however, that Atlas' restraints include horizontal price maintenance since the agents must ship on rates established by Atlas. We take this to be a claim that the horizontal elimination of competition within the system is illegal per se or, failing that, is nevertheless unlawful under a rule-of-reason analysis.

Before turning to the case law, we analyze the economic nature and effects of the system Atlas has created. It will be seen to be a system of a very familiar type, one commonly used in many fields of commercial endeavor.

Atlas has required that any moving company doing business as its agent must not conduct independent interstate carrier operations. Thus, a carrier agent, in order to continue as an Atlas agent, must either abandon its independent interstate authority and operate only under Atlas' authority or create a new corporation (a "carrier affiliate") to conduct interstate carriage separate from its operation as an Atlas agent. Atlas' agents may deal only with Atlas or other Atlas agents.

The result of this is an interstate system for the carriage of household goods in which legally separate companies integrate their activities by contract. In this way the participants achieve many of the same benefits or efficiencies that would be available if they were integrated through ownership by Atlas. At the outset of this opinion, *supra* pp. 2-4, we set out the functions

performed by Atlas and by the agents and stated that the system is a contract integration, one identical, in economic terms, to a partnership formed by agreement. Analysis might begin and end with the observation that Atlas and its agents command between 5.1 and 6% of the relevant market, which is the interstate carriage of used household goods.[3] It is impossible to believe that an agreement to eliminate competition within a group of that size can produce any of the evils of monopoly. *See, e.g.*, 3 J. Von Kalinowski, *Antitrust Laws and Trade Regulation* § 8.02[3], at 8-34 to 8-34.2 & n.71 (1986). A monopolist (or those acting together to achieve monopoly results) enhances its revenues by raising the market price. It can do that only if its share of the market is so large that by reducing its output of goods or services the amount offered by the industry is substantially reduced so that the price is bid up. If a group of Atlas' size reduced its output of services, there would be no effect upon market price because firms making up the other 94% of the market would simply take over the abandoned business. The only effect would be a loss of revenues to Atlas. Indeed, so impotent to raise prices is a firm with a market share of 5 or 6% that any attempt by it to engage in a monopolistic restriction of output would be little short of suicidal.

Appellants argue that Atlas' 6% national market share understates the market power of Atlas and its agents

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[3] The interstate household goods industry consists of 1100 to 1300 interstate carriers, of which the 15 largest constitute 70% of the market. These carriers employ roughly 8,000 agents. Based on data compiled for 1981, Atlas was the sixth largest interstate carrier, with a 5.86% market share. The market share tapered gradually, from the largest firm's 13.3% share to Atlas' position, after which shares dropped precipitously to 3.19% and 1.99% for the seventh and eighth largest firms. *See* Plaintiffs' Statement of Genuine Issues ¶ 69, at 97 ("PSGI"). Thus, the market cannot be said to be heavily concentrated and Atlas is by no means a dominant force in the market.

to impose an anticompetitive result because appellants introduced evidence of the existence of distinct product geographic submarkets and because of evidence that the national market "approximates a tight oligopoly." Reply Brief of Appellants at 19-20. Each of these propositions is wrong. With respect to the existence of submarkets, plaintiffs conceded the existence of a nationwide market and did not offer the district court any evidence that created a genuine issue of material fact as to the existence of submarkets. The district judge, therefore, had only the national market before him. Indeed, so clear is the state of the evidence that we would affirm on this basis even if we thought it was not the rationale of the district court's decision. *See Jaffke* v. *Dunham*, 352 U.S. 280, 281 (1957) (*per curiam*); *United States* v. *General Motors Corp.*, 518 F.2d 420, 441 (D.C. Cir. 1975) (Leventhal, J.); 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil 2d* § 2716, at 658 (1983).

The criteria for defining markets are well-known. Because the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the "relevant market" rests on a determination of available substitutes. As Professor Sullivan has stated:

> To define a market in product and geographic terms is to say that if prices were appreciably raised or volume appreciably curtailed for the product within a given area, while demand held constant, supply from other sources could not be expected to enter promptly enough and in large enough amounts to restore the old price and volume.

L. Sullivan, *Antitrust* § 12, at 41 (1977); *see United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *Satellite Television & Associated Resources, Inc.* v. *Continental Cablevision of Virginia, Inc.*, 714 F.2d 351, 356 (5th Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984). The degree to which a similar product will be substituted for the product in question is said to measure

the cross-elasticity of demand, while the capability of other production facilities to be converted to produce a substitutable product is referred to as the cross-elasticity of supply. The higher these cross-elasticities, the more likely it is that similar products or the capacity of production facilities now used for other purposes are to be counted in the relevant market.

Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962), introduced into merger law the concept of submarkets within the relevant market. The Supreme Court identified several "practical indicia" that may be used to delineate submarkets, such as "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.* at 325. These indicia seem to be evidentiary proxies for direct proof of substitutability. *Brown Shoe* said as much: "Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition 'in *any* line of commerce' (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition." *Id.* at 325.[4] That view of

[4] The first group of indicia mentioned in *Brown Shoe* relates to the ability of the consumer to obtain substitutes for a product and, therefore, goes directly to the economic criteria that make one market distinct from another. One factor is "unique production facilities." If a product requires unique production facilities, and the producer raises the price above the competitive level, the ability of other producers to shift resources to make the product would be limited, and the market definition should be likewise limited. "[D]istinct prices" and "sensitivity to price changes" also relate directly to the economic definition of a market. The first suggests that cross-elasticity of demand is low, the second that it is high.

The second set of indicia bear less directly upon the economic definition of a market, representing observations about

submarket analysis is also mandated by the purpose of the antitrust laws: the promotion of consumer welfare. *See Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979). When submarket indicia are viewed as proxies for cross-elasticities they assist in predicting a firm's ability to restrict output and hence to harm consumers.

Under no recognized definition of submarkets did appellants offer evidence sufficient to raise an issue of material fact. Plaintiffs did not offer evidence that prices in alleged submarkets move independently of prices in surrounding areas or that, if prices were appreciably raised or volume appreciably curtailed in some areas, supply from other sources would not promptly restore the original price and volume. Nor did plaintiffs offer any evidence that any of the *Brown Shoe* "practical indicia" of submarkets are present. Plaintiffs offered instead only assertions that Atlas had high shares of the market in a few cities. Such testimony does not show low cross-elasticities of demand or supply. It does not serve as evidence that these cities were segregable markets in which Atlas could raise prices appreciably without attracting competitors' trucks from adjacent terri-

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what one ordinarily observes when a market is distinct. The "industry or public recognition of the submarket as a separate economic" unit matters because we assume that economic actors usually have accurate perceptions of economic realities. The "product's peculiar characteristics" refers to the general truth that substitutes in a market often have a strong physical and functional relationship. Both "distinct customers" and "specialized vendors" may indicate unique product attributes, which refers again to the fact that products with distinct physical and functional attributes tend to be priced differently. These factors may be helpful where the other indicia are ambiguous. *See generally* 3 J. Von Kalinowski, *Antitrust Laws and Trade Regulation* § 8.02[2], at 8-27 (1986) (stating that *Brown Shoe* does not provide "a new test" for determining the relevant market, but merely provides "several new factors" in discovering "interchangeability between different products").

tories. Aside from this, plaintiffs offered only two casual remarks by carrier agents, one stating that its various offices constitute "distinct market area[s]" and the other merely alluding to "geographic and product markets and submarkets." These general comments were not evidence of anything, and, in particular, they were certainly not evidence that the industry recognized some specific submarket as a "separate economic entity." [5] It is clear that these conclusory remarks, which are all plaintiffs offered, would not suffice to create an issue for a jury, and the trial judge would have to direct a verdict for defendant on the question of submarkets. *See* 10 C. Wright, A. Miller, & M. Kane, *supra*, § 2713.1, at 616. The plaintiffs in this case simply did not furnish any evidence " 'fairly arguable and of a substantial character,' " *General Motors Corp.*, 518 F.2d at 442, of *Brown Shoe* factors indicating the existence of distinct submarkets.[6]

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[5] Indeed, other statements by plaintiffs demonstrate that there could hardly be such an industry recognition since plaintiffs as a group had no common recognition of submarkets. Thus, in support of its claim of a nationwide market, the defendant cited, among other things, the deposition of the owner of one of the plaintiff carrier agents. *See* Defendant's Statement of Material Facts as to Which There Is No Genuine Dispute ¶ 69, at 60; *see also* Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment at 62. This plaintiff testified that the carrier agent is licensed to operate throughout the United States, that is trucks will go wherever there is a "good shipment coming back," and that shorter hauls are preferred but "it doesn't work out that way." Deposition of "Z" at 34. That plaintiff further stated:

> By geography[,] [a] great part of our business is generated in the local marketplace. My sales market area is the whole world, however.

Id. at 120.

[6] Though we do not rely upon this observation in reaching our decision, it seems apparent why plaintiffs did not offer

All that was before the district court, and all that is before us, therefore, is a nationwide market. Atlas, it is agreed, did 6% of the business in that market. And the relevance of this figure as a measure of market power is in no way diminished by appellants' fanciful claims of "tight oligopoly" in the national market.

Given the fact, shown in note 3, that this industry consists of 1100 to 1300 interstate carriers, employing about 8000 agents, it would seem to be impossible to entertain any notion of market power. What plaintiffs offered to support their theory of "tight oligopoly" was a list of van lines and market shares that affirmatively proved their market power contention to be chimerical. Market concentration, and hence presumed power, is commonly measured according to the Herfindahl-Hirschman Index ("HHI"). As the U.S. Department of Justice Merger Guidelines explain, "[t]he HHI is calculated by summing the squares of the individual market shares of all the firms included in the market . . . . Unlike the traditional four-firm concentration ratio, the HHI reflects both the distribution of the market shares of the top four firms and the composition of the market outside the top four firms." U.S. Department of Justice Merger Guidelines at 13-14 (1984) (footnote omitted) ("Merger Guidelines").

The Department of Justice divides market concentration into three categories and characterizes a market

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evidence of real submarkets and why they barely mentioned the point and then in their reply brief only. In an industry in which the supply of the product, space in truck trailers, is among the most mobile factors of production imaginable, and the nature of the business causes these factors of production to be constantly moving throughout the country, it is inconceivable that any showing of submarkets could be made. Any attempt in one city to raise prices above competitive levels would be met by other van lines sending in trucks and trailers at a lower price. This view is supported by a plaintiff's deposition testimony. *See supra* note 5.

with an HHI below 1000 as "unconcentrated." Merger Guidelines at 15. When the HHI is between 1000 and 1800, the market is "moderately concentrated," and above 1800, "highly concentrated." *Id.* One would suppose that a "tight oligopoly" is a market that is "highly concentrated." In fact, when the market shares plaintiffs provided are squared, the van line market has an HHI of approximately 520.[7] It is thus *low* on the range of *unconcentrated* markets. The Guidelines state that "the Department will not challenge mergers falling in this region [below 1000], except in extraordinary circumstances." *Id.* No extraordinary circumstances have been shown, or even suggested, in this case.

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[7] The 1981 national market shares for the top fifteen van lines were as follows:

		SHARE
1.	Allied Van Lines, Inc.	13.30%
2.	North American Van Lines, Inc.	13.07
3.	United Van Lines, Inc.	11.41
4.	Aero-Mayflower Transit Co.	8.46
5.	Bekins Van Lines Co.	6.76
6.	Atlas Van Lines, Inc.	5.86
7.	Global Van Lines, Inc.	3.19
8.	Burnham Van Services, Inc.	1.99
9.	Wheaton Van Lines, Inc.	1.81
10.	American Red Ball Transit	1.18
11.	Neptune World Wide Transit	1.06
12.	National Van Lines, Inc.	.76
13.	Pan American Van Lines, Inc.	.56
14.	Cartwright Van Lines, Inc.	.52
15.	Interstate Van Lines, Inc.	.43

PSGI ¶ 69, at 97. We base our calculation of the HHI on these figures. Although we do not have at our disposal the market share of every firm in the industry, it is only the marginal or "fringe" firms for which we lack data, and the Guidelines explicitly and correctly state that "lack of information about small fringe firms is not critical because such firms do not affect the HHI significantly." Merger Guidelines at 14 n.14.

We do not mean to suggest that if the HHI were higher and within one of the more concentrated categories, the arrangement would necessarily be illegal. It must be recalled that the Guidelines apply to mergers tested under section 7 of the Clayton Act, a statute aimed at halting "incipient monopolies and trade restraints outside the scope of the Sherman Act," *Brown Shoe*, 370 U.S. at 318 n.32, and which therefore applies a much more stringent test than does rule-of-reason analysis under section 1 of the Sherman Act. It must also be recalled that the Guidelines apply to mergers between firms that ordinarily have no internal competition. Here we are dealing with firms that are merely limiting internal competition and are not merging to eliminate competition between firms. Indeed, if every van line in this industry eliminated all internal competition and then the largest two van lines merged, the resulting HHI would be only 868, still well below the top border for "unconcentrated markets."[8] Plaintiffs did not offer

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[8] The Supreme Court has shown that interbrand competition, which is intense in the van line industry, can prevent the manifestation of anticompetitive effects from a firm's internal restraints. In Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 52 n.19 (1977), the Court stated:

> Interbrand competition is the competition among the manufacturers of the same generic product . . . and is the primary concern of antitrust law. The extreme example of a deficiency of interbrand competition is monopoly, where there is only one manufacturer. In contrast, intrabrand competition is the competition between the distributors—wholesale or retail—of the product of a particular manufacturer.
>
> The degree of intrabrand competition is wholly independent of the level of interbrand competition confronting the manufacturer. Thus, there may be fierce intrabrand competition among the distributors of a product produced by a monopolist and no intrabrand competition among the distributors of a product produced by a firm in a highly competitive industry. But when interbrand competition

evidence that this market approximates a tight oligopoly. They offered evidence that makes such a characterization merely absurd and which demonstrates the absence of market power in any van line, much less in Atlas, the sixth largest van line.

We might well rest, therefore, upon the absence of market power as demonstrated both by Atlas' 6% national market share and by the structure of the market. If it is clear that Atlas and its agents by eliminating competition among themselves are not attempting to restrict industry output, then their agreement must be designed to make the conduct of their business more effective. No third possibility suggests itself. But we need not rely entirely upon that inference because the record made in the district court demonstrates that the challenged agreement enhances the efficiency of the van line. The chief efficiency, as already noted, is the elimination of the problem of the free ride.

A carrier agent can attract customers because of Atlas' "national image" and can use Atlas' equipment and order forms when undertaking carriage for its own account. Plaintiffs' Statement of Genuine Issues ¶ 26, at 40 ("PSGI"). The carrier agents "benefit from use of the services of moving and storage firms affiliated with Atlas, for origin or destination work at remote locations, when operating independently of Atlas." *Id.* ¶ 27, at 41. This benefit involves not only the availability of a reliable network of firms providing such services, but also includes the benefit of Atlas' "mediating collection matters" among its affiliates. *Id.* ¶ 27, at 42. To the degree that a carrier agent uses Atlas' reputation, equipment, facilities, and services in conducting business for its own profit, the agent enjoys a free ride

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exists, . . . it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product.

at Atlas' expense. The problem is that the van line's incentive to spend for reputation, equipment, facilities, and services declines as it receives less of the benefit from them. That produces a deterioration of the system's efficiency because the things consumers desire are not provided in the amounts they are willing to pay for. In the extreme case, the system as a whole could collapse.

By their own assertions, appellants establish that the carrier agents in the Atlas organization have benefited from Atlas' business infrastructure in carrying shipments made for their own accounts. Rothery suggests free riding does not occur, and that the district court erred in concluding that it did. *See* Brief for Rothery at 29-30. That argument, however, cannot withstand scrutiny, for Rothery has conceded that the carrier agents associated with Atlas do derive significant benefits from Atlas in dealing with customers for their own profit.[9]

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[9] Rothery's brief has substantially mischaracterized ¶ V-C of its Statement of Material Undisputed Facts below. Rothery cites this paragraph for the proposition that "[w]hen a carrier agent makes a shipment on its own authority, it uses its own trucks, employees, packing materials, and other needed facilities." Brief for Rothery at 29-30. In fact, the paragraph cited by Rothery does not support this sweeping assertion. It concedes that the carrier agents pay only "the bulk . . . costs associated with their operations," and it admits that Atlas made contributions covering some of the costs of operation. Nowhere does the cited paragraph suggest that contributions made by Atlas to the carrier agents benefited only Atlas shipments and not those undertaken for the carrier agents' own accounts. Indeed, the only part of the cited paragraph that even resembles anything for which Rothery cites it is a quotation from the Atlas rules stating that Atlas' operations were to be "conducted primarily with the facilities, drivers, and equipment of the agents of the Company." *See* Statement of Material Undisputed Facts in Support of Plaintiffs' Motion for Partial Summary Judgment as to Liability ¶ V-C, at 15. This amounts to no more than a non-sequitur. It describes the manner by which shipments on Atlas' interstate authority are to be made, and in no way precludes the conclusion that

We find the district court's conclusion that free riding existed to be amply supported and by no means clearly erroneous.

A few examples will suffice. Plaintiff-appellants conceded below that the carrier agents "benefited" from their association with Atlas' "national image." PSGI ¶ 26, at 40. We cannot rationally infer that this consumer identification advantage did not benefit the carrier agents in operating on their own accounts while using Atlas equipment and personnel trained by Atlas. Rothery also allowed that, while the carrier agents bore the bulk of costs associated with their operations, Atlas did make "some small contributions" to the group advertising programs and "some contributions" to the painting of trucks on which the Atlas logo appeared. *See* Statement of Material Undisputed Facts in Support of Plaintiffs' Motion for Partial Summary Judgment as to Liability ¶ V-C, at 15 ("Plaintiffs' Statement of Material Undisputed Facts").

Rothery also credited Atlas with providing a dispatching service, a clearinghouse service for the settlement of accounts among its affiliates, assistance in settling claims among affiliates, certain written forms, sales meetings to provide exposure to national customers, driver and employee training programs, and the screening of the quality and reliability of affiliated firms that provided origin and destination services for the carrier agents. *See* Plaintiffs' Statement of Material Undisputed Facts ¶ V-D, at 15-17.

Rothery did not assert in its Statement of Material Undisputed Facts, nor may we infer, that the carrier

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Atlas contributes to the carrier agents' business facilities and that those contributions benefit the carrier agents in carriage on their own authority and for their own accounts. It goes beyond acceptable advocacy for Rothery to cite ¶ V-C for the proposition that appears in its brief.

agents could not avail themselves of the benefits derived from these services when operating for their own accounts. Many of these services confer intangible advantages that redound to the benefit of the carrier agent as a whole, and do not admit of easy segregation as between shipments on Atlas' interstate authority and shipments on the carrier agent's authority. For example, if Atlas provides superior training to the employees of its carrier agents, that training improves the quality of work not only on shipments undertaken for Atlas but also on shipments made on the carrier agent's own interstate authority. And because carrier agents may elect to use their own or Atlas' interstate authority for a given shipment, *see* Plaintiffs' Statement of Material Undisputed Facts ¶ I-E, at 3, exposure to national clients at Atlas' sales meetings can provide them with interstate customers for their own, as well as for Atlas', accounts.

These examples are not exhaustive, but they illustrate the point. Even though entitled to every favorable inference, *see United States* v. *General Motors Corp.*, 565 F.2d 754 (D.C. Cir. 1977), Rothery, in light of the facts it deemed undisputed below, could not seriously contend that the carrier agents' association with Atlas did not provide them with benefits that aided them in conducting business in competition with Atlas. Thus, because the plaintiff-appellants asserted that the carrier agents paid Atlas only for its clearinghouse service and for the provision of written forms, we agree with the district court's finding that many of the services supplied as part of Atlas' arrangement with the carrier agents' arrangement resulted in Atlas subsidizing its competitiors. *See* 597 F. Supp. at 233.

If the carrier agents could persist in competing with Atlas while deriving the advantages of their Atlas affiliation, Atlas might well have found it desirable, or even essential, to decrease or abandon many such services. *See Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433

U.S. 35, 55 (1977) ("Because of market imperfections such as the so-called 'free rider' effect, [certain] services might not be provided . . . in a purely competitive situation . . . ."). Of that tendency there can be no doubt. When a person or business providing goods or services begins to receive declining revenues, then, other things being equal, that person or firm will provide fewer goods or services. As marginal revenue drops, so does output. Thus, when Atlas' centralized services, equipment, and national image amount to a subsidy of competing carrier agents, this cuts down the marginal revenue derived from the provision of such things so that less will be offered than the market would reward.

On the other side, the firm receiving a subsidized good or service will take more of it. As cost declines, then, other things being equal, demand increases. Carrier agents, that is, will increase the use of Atlas' services, etc., on interstate carriage for their own accounts, overconsuming that which they can obtain at less than its true cost. In this way, free riding distorts the economic signals within the system so that the van line loses effectiveness in serving consumers. The restraint at issue in this case, therefore, is a classic attempt to counter the perceived menace that free riding poses. By compelling carrier agents to transfer their interstate authority to a separate entity, Atlas can continue providing services at optimal levels, confident that it will be paid for those services.

The Atlas agreements thus produce none of the evils of monopoly but enhance consumer welfare by creating efficiency. There seems no reason in the rationale of the Sherman Act, or in any comprehensible policy, to invalidate such agreements. Nevertheless, at one, intermediate, point in the history of antitrust, Supreme Court decisions seemed to require just that result. It seems clear, however, that the law has returned to the original understanding so that the agreements before us are

plainly lawful. Current decisional law is best understood if placed in historical context.

V.

The law concerning contract integrations and the restraints of trade that augment their effectiveness has been a variable growth. At times, courts have thought integrations or partnerships with restraints like Atlas' obviously not only lawful but desirable. At other times, courts have treated the restraints as illegal per se, beyond any possibility of justification. The question is the state of the law today. We begin with the law's earliest analysis of such restraints, then discuss later cases that implicitly repudiated that analysis, and, finally, seek to discover the degree to which the law has now returned to its original formulation.

A.

From the inception of antitrust policy, the Supreme Court has recognized that the elimination of rivalry by the joinder of rivals into a larger economic unit is not, per se, an unlawful restraint of trade. After framing a rule of per se illegality for naked price fixing among competitors in *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290 (1897), the Supreme Court in *United States* v. *Joint Traffic Association*, 171 U.S. 505 (1898), responded to the objection that condemning every restraint would destroy the most ordinary and indispensable contracts and integrations since they restrained the competition of the parties. The Court majority replied that neither the formation of a corporation or a contract of partnership had ever "been regarded in the nature of a contract in restraint of trade or commerce." 171 U.S. at 567. Though the verbal formulation of the law has changed, it remains true that the lessening of actual or potential rivalry inherent in the formation of every corporation and every partner-

ship has never been held or said to be illegal per se by the Supreme Court. As Justice Holmes put it in dissent in *Northern Securities Co.* v. *United States*, 193 U.S. 197, 411 (1904) (misconstruing the rule applied by the majority), any such interpretation of the Sherman Act "would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms." No such construction of the Act is thinkable.

Appellants here do not challenge the formation or existence of the Atlas system. They complain only of the agreement that prevents them from maintaining an independent interstate carrier operation in the same corporation that acts as an agent of Atlas. The law has had more difficulty with agreements of this sort than it has had with the underlying integration or partnership. We begin by examining the Sherman Act's earliest position with respect to such agreements.

In *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899), Judge (later Chief Justice) William Howard Taft framed a rule of per se illegality for "naked" price-fixing and market-dividing agreements, *i.e.*, agreements between competitors who cooperated in no other integrated economic activity. But Taft recognized that such a rule would not do where fusions or integrations of economic activity occurred and, further, that agreements eliminating rivalry within such an enterprise were means of enhancing the firm's efficiency. He explained the reasons for the validity of an agreement "by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm":

> [W]hen two men became partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to

> the comunity. Restrictions in the articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged.

United States v. *Addyston Pipe & Steel Co.*, 85 F. at 280.

To be ancillary, and hence exempt from the per se rule, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose. Of course, the restraint imposed must be related to the efficiency sought to be achieved. If it is so broad that part of the restraint suppresses competition without creating efficiency, the restraint is, to that extent, not ancillary. Taft added the further obvious qualification that even restraints ancillary in form are illegal if they are part of a general plan to gain monopoly control of a market. 85 F. at 282-83.

If Taft's formulation is the law today, it is obvious that the Atlas agreements are legal, for *Addyston Pipe & Steel*'s analysis of ancillary restraints fits this case exactly.[10] The Atlas network involves a union of the

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[10] A hypothetical was posed as oral argument which seems instructive. If there were a number of law firms in a given location of a size distribution like that of the van lines in this case, the extraction of a promise by each partnership that its members and associates not compete with the firm could, by no one's estimation, be construed as running afoul of § 1 of the Sherman Act. Indeed, it is with respect to the legal profession that the law has properly distinguished between lawful ancillary and unlawful naked restraints. Although literally price fixing among competitors, fee schedules imposed by a law partnership are accepted, even taken for granted. Yet in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the Supreme Court held that a minimum fee schedule applicable

parties' enterprise to carry on a useful business, the challenged agreements are ancillary in that they enhance the efficiency of that union by eliminating the problem of the free ride, and, given Atlas' small market share, the agreements cannot be part of a plan to gain monopoly control of the market.

B.

The argument that horizontal eliminations of competition among legally independent persons or companies are automatically illegal, even though the restraint is ancillary to a partnership or a joint venture, rests primarily upon *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972). The business arrangement in *Topco* very closely resembles Atlas' policy.

Topco was a cooperative association of twenty-five small and medium-sized regional supermarket chains operating stores in thirty-three states. Topco functioned as a purchasing agent for its members, ensured quality control on purchased products, developed specifications for certain types of products, and performed other tasks that gave members the efficiencies usually attainable only by large chains. Topco's stock was owned by its member chains. They were geographically dispersed and, in their various areas, had market shares ranging from 1.5% to 16%, with the average being about 6%.

The legal challenges centered on Topco's private-label program. Topco members had difficulty competing with larger chains and this problem was to some degree attributable to the larger chain's ability to develop their own private labels. The Court's opinion set out some of the efficiencies of private labeling:

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to the entire bar of a state violated § 1 of the Sherman Act. Thus, in its actual operation, the law has recognized the propriety of horizontal restraints ancillary to an efficiency-producing economic integration as distinct from the imposition of such restraints by competitors who have integrated none of their productive endeavors.

> Private-label products differ from other brand-name products in that they are sold at a limited number of easily ascertainable stores. A&P, for example, was a pioneer in developing a series of products that were sold under an A&P label and that were only available in A&P stores. It is obvious that by using private-label products, a chain can achieve significant cost economies in purchasing, transportation, warehousing, promotion, and advertising. These economies may afford the chain opportunities for offering private-label products at lower prices than other brand-name products. This, in turn, provides many advantages of which some of the more important are: a store can offer national-brand products at the same price as other stores, while simultaneously offering a desirable, lower priced alternative; or, if the profit margin is sufficiently high on private-brand goods, national-brand products may be sold at reduced price. Other advantages include: enabling a chain to bargain more favorably with national-brand manufacturers by creating a broader supply base of manufacturers, thereby decreasing dependence on a few, large national-brand manufacturers; enabling a chain to create a "price-mix" whereby prices on special items can be lowered to attract customers while profits are maintained on other items; and creation of general goodwill by offering lower priced, higher quality goods.

United States v. *Topco Associates*, 405 U.S. at 599 n.3.

Thus, Topco, like Atlas, was a contractual integration of legally independent businesses designed to achieve efficiencies unavailable to its members separately. Also like Atlas, however, Topco had an ancillary horizontal restraint designed to make the integration more effective. Members could sell Topco-brand products only in designated, and usually exclusive, territories. Member chains were free to expand into each other's territories, and did, but they could not sell the Topco brand in the new territory if another member held the rights there. This re-

straint had a clear relationship to marketing effectiveness. As Topco said, "'[p]rivate label merchandising is a way of economic life in the food retailing industry, and exclusivity is the essence of a private label program; without exclusivity, a private label would not be private.'" 405 U.S. at 604. It noted that every national and large regional chain had its own exclusive private-label products. "'Each such chain relies upon the exclusivity of its own private label line to differentiate its private products from those of its competitors and to attract and retain the repeat business and loyalty of consumers.'" *Id.* at 604-05. Smaller chains had to have their own lines to compete with larger chains, which accounted for the Topco program, and needed similar exclusivity for advertising and promotional purposes, which accounted for the market division with respect to the Topco label.

The Supreme Court said, however, "[w]e think that it is clear that the restraint in this case is a horizontal one, and, therefore, a per se violation of § 1 [of the Sherman Act]." 405 U.S. at 608. The *Topco* opinion also clarified *United States* v. *Sealy Corp.*, 388 U.S. 350 (1967), which had appeared to hold illegal a very similar set of restraints among mattress manufacturers that wished to market a national brand because both price fixing and market division were involved. *Sealy* was now said to hold that horizontal territorial limitations by themselves were per se unlawful. *See* 405 U.S. at 609.

If *Topco* and *Sealy*, rather than *Addyston Pipe & Steel*, state the law of horizontal restraints, the restraints imposed by Atlas would appear to be a per se violation of the Sherman Act. An examination of more recent Supreme Court decisions, however, demonstrates that, to the extent that *Topco* and *Sealy* stand for the proposition that all horizontal restraints are illegal per se, they must be regarded as effectively overruled.

C.

The Supreme Court reformed the law of horizontal restraints in *Broadcast Music, Inc.* v. *Columbia Broadcasting System*, 441 U.S. 1 (1979) (*"BMI"*), *National Collegiate Athletic Association* v. *Board of Regents*, 104 S. Ct. 2948 (1984) (*"NCAA"*), and *Northern Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 105 S. Ct. 2613 (1985) (*"Pacific Stationery"*).

In *BMI*, CBS brought suit to challenge the blanket licenses to perform copyrighted musical compositions issued by BMI and by the American Society of Composers, Authors and Publishers ("ASCAP"). Each blanket license gave the licensee the right to perform any and all of the compositions owned by members and affiliates of the performing rights organization for a stated period of time. Since BMI and ASCAP negotiated the price of their blanket licenses and distributed royalties to the copyright owners, the charge, upheld by the court of appeals, was that the blanket license was a form of price fixing between the copyright owners and so was a horizontal restraint illegal per se under the Sherman Act.

The Supreme Court rejected a "literal approach" to price-fixing because that approach, by itself, does not establish whether a particular practice is of a type that is plainly anticompetitive and very likely without redeeming virtue.

> Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally "price fixing," but they are not *per se* in violation of the Sherman Act. See *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 280 (CA6 1898), aff'd 175 U.S. 211 (1899).

BMI, 441 U.S. at 9. That observation is significant for it shows that the *BMI* Court recognized that partnerships, one form of integration by contract, involve horizontal restraints that are not per se illegal. It also dem-

onstrates, contrary to appellants' claims here, that "price fixing" within a contract integration does not necessarily violate the antitrust law. But the Court's analysis of whether the per se label was appropriate in *BMI* has even more significance for the present case.

The Court began by noting the existence of consent decrees the government had worked out with ASCAP and BMI, said the decrees, though they did not immunize the blanket license from third parties' suits, did indicate that "the challenged practice may have redeeming competitive virtues," so that the decrees could not be ignored completely in analyzing the practice of blanket licensing. *See* 441 U.S. at 13. Moreover, Congress, albeit in other performances contexts, had created compulsory blanket licenses, reflecting an opinion that blanket licenses "are economically beneficial in at least some circumstances." *Id.* at 16.

These observations have their analogues in the present case. That the challenged practice of agent exclusivity "may have redeeming competitive virtues" is shown by the fact that all van lines use the practice, *see* 597 F. Supp. at 222, and that the Interstate Commerce Commission routinely approves the practice, without even requiring a hearing. *See Three Way Corp.* v. *United States*, Nos. 84-1280 & 84-1282 (D.C. Cir. June 3, 1986). The constraints the consent decrees placed on ASCAP, *BMI*, 441 U.S. at 24, which has a great majority of the most desired music played in the United States, are analogous to the restraints the free market places on Atlas, which does less than 6% of the business in its market. Moreover, just as Congress recognized the utility of the blanket license, so Congress has recognized the utility of restraints of the sort Atlas imposes. That is shown by the congressional provision of antitrust immunity for ICC-approved pooling agreements containing such restrictions and is further evidenced by the Senate Committee on Commerce, Science and Transportation statements concerning restrictions imposed outside a pooling agreement:

> During the course of its deliberations, *the Committee considered* a proposal to include within the immunity section [49 U.S.C. § 10934(d)] *language that would grant immunity to agreements concerning exclusive agency representation, or the fiduciary duty of loyalty of an agent not to compete with the principal concerning the subject matter of the agency.* The Committee determined that *this type of relationship is not a violation of the antitrust laws and is standard agency law* as expressed in Section 393 of the Restatement of the Law of Agencies section. The Committee felt that inclusion of such language could imply that such relationships are a violation of the antitrust laws in the absence of immunity. Thus, the Committee determined not to include such language in the bill.

S. Rep. No. 497, 96th Cong., 1st Sess. 8 (1979) (emphasis added). Though, like the Court in *BMI*, we are not bound by Congress' opinion, it does suggest that agency exclusivity is "economically beneficial in at least some circumstances."

These parallels between *BMI* and Atlas' practice are specific to the two cases. They may be enough to take this particular practice out of the category of per se illegality. But there is in *BMI* reasoning of more general application which indicates that *Topco* does not state the modern rule as to horizontal restraints. There is, first, the Court's favorable citation of *Addyston Pipe & Steel*'s example of partners who eliminate price competition between themselves. If *Topco* meant, as it seemed to, that the existence of a joint venture could not justify an agreement eliminating competition betwen the joint venturers, the *BMI* Court must be read as overruling *Topco* to that extent.

The opinion pointed out that the practices of ASCAP and BMI were necessary to secure for copyright owners the right to control and profit from the public performance of their musical compositions. The Court said, "we

would not expect that any market arrangements reasonably necessary to effectuate the rights that are granted would be deemed a per se violation of the Sherman Act." *BMI*, 441 U.S. at 19. In the present case, there is authority to conduct interstate carriage granted by the ICC. Atlas holds that authority but would have a difficult time using it but for its arrangements with its agents. Atlas is not in a position to conduct all of the carriage involved itself. The restraints it imposes are reasonably necessary to the business it is authorized to conduct. One may quibble about whether the ASCAP blanket license is more necessary to the conduct of that business than the agent exclusivity arrangement is to the conduct of Atlas' business. We do not believe, however, that, in choosing the words it did, the Supreme Court intended that lower courts should calibrate degrees of reasonable necessity. That would make the lawfulness of conduct turn upon judgments of degrees of efficiency. There is no reason in logic why the question of degree should be important.

That conclusion is buttressed by the Court's next observation, that

> inquiry must focus on whether the effect and, here because it tends to show effect, . . . the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, *whether the practice facially appears to be one that would* always or almost always *tend to restrict competition and decrease output . . . or instead one designed to "increase economic efficiency* and render markets more, rather than less, competitive."

BMI, 441 U.S. at 19-20 (emphasis added) (citations omitted). This inquiry implements the Court's designation of consumer welfare as the policy goal of the Sherman Act. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979). The Court concluded that the blanket license, though it involved price fixing in a literal sense,

was not per se unlawful and remanded the case for further rule-of-reason analysis.

The Supreme Court's *NCAA* decision confirms the analytical approach adopted in *BMI*. The NCAA, as part of its regulation of intercollegiate athletics, adopted a plan for the televising of member institutions' football games. The plan limited the number of intercollegiate contests that could be televised and the number of times any one college could televise. No college could sell television rights independently. NCAA negotiated with two networks and arranged a specified price for categories of games. Colleges dissatisfied with the plan's limitations on their ability to sell television rights brought suit, challenging the restraints under section 1 of the Sherman Act. The Supreme Court ruled that section 1 was violated but, significantly for the present case, refused to apply a per se rule.

In language we have already quoted, *supra* p. 9, the Court held that the NCAA plan created a horizontal restraint on price competition, 104 S. Ct. at 2959, but nevertheless explicitly refused to apply the per se rule, *id.* at 2960. It did so on the ground that horizontal restraints were necessary if the product was to be available. *Id.* at 2961. Moreover, the Court cited *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 51-57 (1977), for the proposition that "a restraint in a limited aspect of a market may actually enhance marketwide competition." 104 S. Ct. at 2961-62. *Sylvania* held a rule of per se illegality inappropriate to a manufacturer's division of its dealers' territories. The Court reasoned that the restraint addressed the problem of the free ride, *see* 433 U.S. at 55—if dealers could locate in each other's territories, those who spent on advertising and promotion might not be able to recover their investment. Some dealers, with no advertising and promotion costs, could charge lower prices and capture the customers created by others' expenditures. By applying *GTE Sylvania* in a

horizontal case as "requir[ing] consideration of the NCAA's justifications for the restraints, 104 S. Ct. at 2962, the Supreme Court made it clear that elimination of the free ride is an efficiency justification available to horizontal restraints that are ancillary to a contract integration. Following *BMI*, the Court reserved the per se rule for practices that, on their face, appear to be of the type that " 'would always or almost always tend to restrict competition and decrease output.' " *Id.* at 2960 (citing *BMI*, 441 U.S. at 19-20). When per se treatment is inappropriate, the court must consider the justifications advanced for the restraint. 104 S. Ct. at 2962. After noting that consumer welfare is the goal of the Sherman Act, the Court said:

> A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law. Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.

Id. at 2964 (footnote omitted). Upon considering the justifications advanced by the NCAA, the Court concluded that the restraint did not increase efficiency but decreased output and so violated section 1 of the Sherman Act.

Pacific Stationery applies to boycotts the general formula stated in *BMI* and *NCAA*—that the per se rule is confined to practices of the type that almost always decrease output rather than increasing efficiency—and so confirms, if confirmaiton were needed, that the formula applies to all horizontal restraints. *Pacific Stationery*, as already noted, involved the expulsion of a stationer from a wholesale purchasing cooperative for violation of the bylaws. The Court noted the efficiencies attainable through such cooperative ventures and said that a joint venture "must establish and enforce reasonable rules in

order to function effectively." 105 S. Ct. at 2620. This is a recognition that ancillary restraints are essential to the efficiency of a contract integration. An anticompetitive effect is to be presumed only if the plaintiff makes a "threshold showing" that the group "possesses market power or exclusive access to an element essential to effective competition." *Id.* This statement of the law of ancillary restraints is so close to that of *Addyston Pipe & Steel* as to be virtually indistinguishable.

BMI, *NCAA*, and *Pacific Stationery* dictate the result in this case. All horizontal restraints are alike in that they eliminate some degree of rivalry between persons or firms who are actual or potential competitors. This similarity means that the rules applicable to all horizontal restraints should be the same. At one time, as we have seen, the Supreme Court stated in *Topco* and *Sealy* that the rule for all horizontal restraints was one of per se illegality. The difficulty was that such a rule could not be enforced consistently because it would have meant the outlawing of very normal agreements (such as that of law partners not to practice law outside the firm) that obviously contributed to economic efficiency. The alternative formulation was that of Judge Taft in *Addyston Pipe & Steel*: a naked horizontal restraint, one that does not accompany a contract integration, can have no purpose other than restricting output and raising prices, and so is illegal per se; an ancillary horizontal restraint, one that is part of an integration of the economic activities of the parties and appears capable of enhancing the group's efficiency, is to be judged according to its purpose and effect. In *BMI*, *NCAA*, and *Pacific Stationery*, the Supreme Court returned the law to the formulation of *Addyston Pipe & Steel* and thus effectively overruled *Topco* and *Sealy* as to the per se illegality of all horizontal restraints.

The application of these principles to Atlas' restraints is obvious because, as we have seen, *supra* pp. 2-4, 22-26,

these restraints are ancillary to the contract integration or joint venture that constitutes the Alas van line. The restraints preserve the efficiencies of the nationwide van line by eliminating the problem of the free ride. There is, on the other hand, no possibility that the restraints can suppress market competition and so decrease output. Atlas has 6% or less of the relevant market, far too little to make even conceivable an adverse effect upon output. If Atlas should reduce its output, it would merely shrink in size without having any impact upon market price. *See supra* p. 14. Under the rule of *Addyston Pipe & Steel*, *BMI*, *NCAA*, and *Pacific Stationery*, therefore, it follows that the Atlas agreements do not violate section 1 of the Sherman Act.[11]

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[11] Two additional points should be made. First, we do not think it significant to the outcome that Atlas' policy allowed agents to exercise their own interstate authority through separate corporations. Once it is clear that restraints can only be intended to enhance efficiency rather than to restrict output, the degree of restraint is a matter of business rather than legal judgment. Second, though it is sometimes said that, in the case of restraints like these, it is necessary to weigh procompetitive effects against anticompetitive effects, we do not think that a useable formula if it implies an ability to quantify the two effects and compare the values found. Here, there are no anticompetitive effects and so there is nothing to place on that side of the scale. If the underlying contract integration is lawful, *i.e.*, not of such size as to violate the Sherman Act, restraints ancillary to the integration, in the sense we have described, should be lawful. Weighing effects in any direct sense will usually be beyond judicial capabilities but predictions about effects may be reflected in rules about allowable size. The concurrence appears to suggest that the district court conducted a balancing of effects in some fashion other than by drawing inferences from market share and structure. If so, the district court did not explain its alternative method and made no findings on the subject. Nor does the concurrence articulate an alternative means of weighing procompetitive and anticompetitive effects. Antitrust adjudication has always proceeded through inferences about market power drawn from market shares. *See, e.g.*, Consultants &

A joint venture made more efficient by ancillary restraints, is a fusion of the productive capacities of the members of the venture. That, in economic terms, is the same thing as a corporate merger. Merger policy has always proceeded by drawing lines about allowable market shares and these lines are based on rough estimates of effects because that is all the nature of the problem allows. If Atlas bought the stock of all its carrier agents, the merger would not even be challenged under the Department of Justice Merger Guidelines because of inferences drawn from Atlas' market share and the structure of the market. We can think of no good reason not to apply the same inferences to Atlas' ancillary restraints.

The judgment of the district court is

Affirmed.

Designers, Inc. v. Butler Service Group, Inc., 720 F.2d 1553, 1562-63 (11th Cir. 1983) (holding under § 1 that when a defendant has "a relatively small portion of the . . . [relevant] market," imposition of a restraint cannot be construed "impermissibly [to] hurt either . . . competitors or competition"); Smith v. Pro-Football, Inc., 593 F.2d 1173, 1185-86 (D.C. Cir. 1978) (applying § 1 and finding the "predictable effect" of a restraint imposed by 100% of the teams was "significantly anticompetitive"); United States v. Aluminum Company of America, 148 F.2d 416, 424 (2d Cir. 1945) (L. Hand, J.) (a § 2 case holding that "[ninety] percent[] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four perecnt would be enough; and certainly thirty-three percent is not").

WALD, *Circuit Judge*, concurring: I concur in the result and in much of the reasoning of the panel's opinion. I write separately, however, to point out several concerns that I have about the panel's analysis once it establishes that no *per se* violation existed and the restraint should be looked at under the rule of reason. I believe that the District Court correctly undertook, in the traditional way, to "carefully balance" the "anticompetitive evils of the challenged practice . . . against its procompetitive virtues." *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173, 1183 (D.C. Cir. 1978). In fact, at one point the panel concedes that the record made in the District Court demonstrates, even without reliance on inferences drawn from market power, "that the challenged agreement enhances the efficiency of the van lines." Pan. op. at 22. I am uncomfortable, therefore, with the panel's suggestions that the District Court's balancing was unnecessary, and indeed a useless exercise.

The panel concludes that no balancing was required here since a defendant lacking significant market power cannot act anticompetitively by reducing output and increasing prices. If, as the panel assumes, the *only* legitimate purpose of the antitrust laws is this concern with the potential for decrease in output and rise in prices, reliance on market power alone might be appropriate.[1] But, I do not believe that the debate over the purposes of

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[1] In Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 105 S. Ct. 2613 (1985), the Court held that the *per se* rule of illegality did not apply absent an allegation that the "cooperative possesses market power or unique access to a business element necessary for effective competition." 105 S. Ct. at 2613. Since the plaintiffs had not alleged any such market advantage, the Court remanded for rule of reason analysis. According to the panel's analysis, plaintiff's failure to allege market power should have been determinative of the rule of reason injury as well. Nothing in *BMI*, *NCAA*, or *Pacific Stationery* supports the panel's new *per se* rule of legality.

antitrust laws has been settled yet.[2] Until the Supreme Court provides more definitive instruction in this regard,[3] I think it premature to construct an antitrust test that ignores all other potential concerns of the antitrust laws except for restriction of output and price raising.

The panel also suggests that even if some kind of balancing[4] were appropriate, the only feasible way of doing

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[2] *Compare* Bork, *The Antitrust Paradox* (1978) (only goal is to increase economic efficiency); R. Posner, *Antitrust Law: An Economic Perspective* (1976) (efficiency is not only important goal, it is the only goal of antitrust law) *with* Pitofsky, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051 (1979) (antitrust laws promote political values including fear of excessive concentration of economic power and a desire to enhance individual and business freedom); Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. Pa. L. Rev. 1076, 1076 (1979) ("putative economic gains should not be the exclusive or decisive factors in resolving antitrust controversies"); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 32 Hastings L. J. 65, 68 (1983) ("Congress passed the antitrust laws to further economic objectives, but primarily objectives of a distributive rather than of an efficiency nature"); *see generally Symposium: The Goals of Antitrust: A Dialogue on Policy*, 65 Colum. L. Rev. 33 (1965).

[3] I do not think that Reiter v. Sonotone, 442 U.S. 330, 343 (1979), answers the question. There, the Court was asked to decide whether consumers who purchase goods for their own use have standing to sue under section 4 of the Clayton Act. It is thus hardly surprising that the Court answered the question by saying that the floor debates suggest that Congress designed the Sherman Act as a "consumer welfare prescription." *Id.* Moreover, even if one thinks that the Court intended to exclude all other considerations, the phrase "consumer welfare" surely includes far more than simple economic efficiency.

[4] I am also somewhat troubled by the panel's statement that "[o]nce it is clear that restraints can only be intended to enhance efficiency rather than to restrict output, the degree of restraint is a matter of business rather than legal judgment." Pan. op. at 40 n.11. I understand the panel's position

it would be to use market share as a surrogate for anticompetitive effects. *See* Pan. op. at 40 n.11 ("Though it is sometimes said that in cases of restrictions like these, it is necessary to weigh procompetitive effects against anticompetitive effects, we do not think that a usable formula. . . . Weighing effects in any direct sense will usually be beyond judicial capabilities but predictions about effects may be reflected in rules about allowable size."). I acknowledge that traditional rule of reason balancing does not lend itself to neat equations, or percentages, or even Herfindahl-Hirschman indices providing a definitive answer. Nonetheless, to my knowledge, the Supreme Court has so far not decided rule of reason cases solely by looking at market shares. Instead, it has looked to the totality of circumstances surrounding a restraint to determine whether, on balance, it constitutes an unreasonable restraint of trade. *See, e.g., N.C.A.A.* v. *Board of Regents of the University of Oklahoma*, 104 S. Ct. 2948, 2967 (1984) (looking at asserted procompetitive virtues even after determining that defendant had monopoly power); *Broadcast Music Industries* v. *CBS*, 441 U.S. 1 (1979) (instructing lower court to take procompetitive virtues of blanket licensing into account even though defendants had huge market shares).[5]

Until the Supreme Court indicates that the *only* goal of antitrust law is to promote efficiency, as the panel uses that term, I think it more prudent to proceed with a pragmatic, albeit nonarithmetic and even messy rule of

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to be that the breadth of the restraint is a matter to be analyzed in determining whether the restraint is ancillary in the first place. *See* Pan. op. at 29-30. If the restraint is not ancillary, it is a naked restraint, subject to the *per se* rule of illegality.

[5] Although both of these examples involve the Court's balancing of potential procompetitive virtues against a market power presumption of anticompetitiveness, the panel's argument that genuine balancing is technically impossible would seem to apply there as well.

reason analysis, than to adopt a market power test as the exclusive filtering-out device for all potential violaters who do not command a significant market share. Under any analysis, market power is an important consideration; I am not yet willing to say it is the only one.[6]

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[6] In addition to my doctrinal difficulties with the panel's approach, I am also concerned about its heavy reliance on the 6% figure representing Atlas' share of the national market for intercity transport of used household goods. Although the panel concludes that the national market was not *sufficiently* contested as the only relevant market to establish a genuine issue of fact, the fact remains that the exclusivity of that market was indeed contested before the District Court and the District Court made no findings on the issue. Conceding that the national market was *a* relevant market, plaintiffs went on to explain that

> within the national market, there are product submarkets of new and used household goods shipments and submarkets divided according to the type of shipment, including national account, government and c.o.d. shipments, and including long-haul and short-haul shipments. Geographically, markets are national, regional and local.

Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment [hereinafter "Plaintiffs' Opposition"] at 53-60. Plaintiffs produced *affidavits and other evidence, see* Fed. R. Civ. P. 56(e), for the proposition that these were separate markets, *see* "X's" Response to Second Interrogatory 43, and that in some of the geographic markets, Atlas' market shares were 30% and 40%, and in one large geographic market, 60%. Deposition of "Y" at 68; *see generally* Plaintiffs' Opposition at 53-60.

The panel today holds that such affidavits and evidence are not sufficient to establish that the existence of submarkets is a genuine issue. It fails to explain just how detailed the evidence of submarkets must be to withstand a defendant's motion for summary judgment, but creates the distinct impression that plaintiffs' proof of such markets must be substantial and comprehensive indeed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5845 September Term, 1985

Rothery Storage & Van Co.

v. Filed August 7, 1986

Atlas Van Lines, Inc.

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ginsburg, Bork, Scalia, Starr, Silberman, Buckley and Williams, Circuit Judges

O R D E R

Appellants' suggestion for rehearing en banc was circulated to the full Court and the taking of a vote thereon was requested. A majority of the judges of the Court in regular, active service did not vote in favor of the suggestion. Accordingly, it is

ORDERED, by the Court en banc, that appellants' suggestion is denied.

Per Curiam

BY THE COURT:
GEORGE A. FISHER, CLERK

BY: Robert A. Bonner
Chief Deputy Clerk

Chief Judge Wald and Circuit Judge Mikva would grant the suggestion for rehearing en banc.

ROTHERY STORAGE & VAN CO. et al., Plaintiffs,

v.

ATLAS VAN LINES, INC., Defendant.

Civ.A. No. 83-0450

United States District Court
District of Columbia.

Oct. 30, 1984

As Corrected Nov. 9, 1984.

MEMORANDUM

OBERDORFER, District Judge.

This is a private antitrust action brought pursuant to Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), against Atlas Van Lines, Inc. ("Atlas"), a nationwide van line company.[1] Plain-

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1. In their complaint, filed February 17, 1983, plaintiffs also named the Interstate Commerce Commission ("ICC") as a party-defendant. Plaintiffs requested - as a predicate to certain further relief against the ICC-that the Court compel the ICC to reach a decision on a related matter pending before the agency. In light of intervening developments and

tiffs are ten present and former agents of Atlas. They challenge an Atlas policy - made effective in August 1983 - under which Atlas announced that it would terminate its agency relationship with any agent that maintained independent operations in the interstate moving business unless the agent transferred its independent authority to do so to a separate and distinct (albeit affiliated) company. The case is presently before the Court both on defendant's motion for summary judgment and on plaintiffs' motion for partial summary judgment as to liability. After careful consideration of undisputed facts developed after extensive discovery and set out pursuant to Fed.R.Civ.P. 56

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upon motion by the ICC, the Court on May 26, 1983 dismissed the action against the ICC as moot. See Order of May 26, 1983. The ICC is thus no longer a defendant in this suit.

and Local Rule 1-9(h), as well as the arguments advanced by the parties in their memoranda and at oral argument, the Court concludes that, for the reasons set forth below, plaintiffs' motion for partial summary judgment as to liability must be denied, and defendant's motion for summary judgment must be granted.

I.

This lawsuit involves, in essence, the legality of Atlas's response to the regulatory and commercial changes resulting from the deregulation of the household goods moving industry in 1980. A brief overview of Atlas's methods of operation and of the recent changes in the industry is necessary to an understanding of the nature of the claims at issue.

Defendant Atlas Van Lines holds authority from the Interstate Commerce

Commission ("ICC") to transport goods from state to state on a nationwide basis. Statement of Material Undisputed Facts in Support of Plaintiffs' Motion for Partial Summary Judgment As To Liability ¶ II-A (hereinafter "PSF" ["Plaintiffs' Statement of Facts"]); Defendant's Response to Plaintiffs' Statement of Material Undisputed Facts ¶ II-A (hereinafter "DRPF" ["Defendant's Response to Plaintiffs Facts"]); Defendant's Statement of Material Facts As To Which There Is No Genuine Issue ¶ 1 (hereinafter "DSF" ["Defendant's Statement of Facts"]); Plaintiffs' Statement of Genuine Issues ¶ 1 (hereinafter "PSGI").[2] As has been typical of the

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2. Plaintiffs' "Statement of Genuine Issues" purports to dispute a number of material facts asserted by defendant. Close comparison of plaintiffs' assertions discloses that while many of them challenge the implications or characterizations of defendant's statements, they

operation of other national van lines, Atlas exercises this authority primarily through a group of "agent" moving companies around the country. These "agent" companies are independent

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do not effectively traverse them so as to put material facts into genuine dispute. For example, plaintiffs state that they cannot "accept[] as undisputed" the statement by defendant that "Atlas headquarters directs and coordinates [certain] agent activities." PSGI ¶ 4, at 10-11. Plaintiffs, thus, object that Atlas does not "'direct' the performance of origin or destination services, in any direct supervisory sense." Id: (emphasis added). As suggested by the qualification at the end of the quotation, though, plaintiffs fail to dispute that Atlas does indeed have the authority to set the general terms according to which Atlas agents peform these functions for Atlas. And indeed, plaintiffs concede that "Atlas does coordinate the movement of trucks, to a substantial degree. " Id. at 11. Throughout this memorandum, in citing to corresponding portions of plaintiffs' and defendant's factual pleadings, the Court relies on the assertions therein to the extent that they reveal areas of agreement as described above, while disregarding any specific facts as to which the parties have succeeded in raising a genuine issue.

entities that have entered into standardized "Agency Agreements" with Atlas to carry out interstate shipments under Atlas's authority, PSF ¶¶ II-C, V-P, DRSF ¶¶ II-C, V-P, Plaintiffs' Appendix 1 (hereinafter "Plaintiffs' App."), and that agree - in making Atlas shipments - to abide by the operating procedures, painting and maintenance standards, and uniform rates, inter alia, provided for by the Agency Agreement. See PSF ¶¶ V-O-V-X; DRPF ¶¶ V-O-V-X; DSF ¶¶ 2-13; PSGI ¶2-13. In addition, representatives of some of Atlas's agent companies sit on the Atlas board of directors, PSF ¶ II-K, V-A; DRPF ¶¶ II-K, V-A - a practice that has been typical in the industry during many years of ICC oversight, see S.Rep. No. 497, 96th Cong., 1st Sess. 8 (1979); H.Rep. No. 1372, 96th Cong., 1st Sess. 10 (1979), and that won express

legislative immunity from the federal antitrust laws - as described below - with the enactment of 49 U.S.C. §10934(d) in 1980.[3] Nonetheless, the agent companies in the field remain wholly

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3. The validity of the Atlas policy at issue in this case involves consideration of two separate statutory immunity provisions: 49 U.S.C. §§ 11341-11342 (1982), and 49 U.S.C. § 10934(d) (1982).

The first of these provisions, 49 U.S.C. §§ 11341-11342, has relevance to the van line practice, described infra at pages 221-222 [pgs. 12-13a], of allowing some agents (referred to as "carrier-agents") to possess and and exercise their own independent interstate ICC authority in addition to acting as agents for the van line. Coordination between a van line and its carrier-agents has, under 49 U.S.C. §§§ 11341-11342, long been immune from the federal antitrust laws provided that the van line and its carrier-agents enter into a "pooling agreement" meeting ICC approval. See infra at page 221. There is no dispute in this case as to the immunity provided by this provision.

The second provision, 49 U.S.C. § 10934(d), was enacted in 1980 as part of Congress's deregulation of the household goods moving industry, see Pub.L. 96-454, § 5(a)(1), 94 Stat. 2013 (1980), and it is this provision that addresses, inter alia, the membership on a van

independent from Atlas itself and interact with Atlas in accordance with standard contractual arrangements. PSF ¶ V-P, DRPF ¶ V-P.

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line's board of directors of the van line's own agents. Plaintiffs do not dispute that, under the statute, the fact of such membership is immune from antitrust challenge. See Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment at 18. Yet the further scope of this immunity provision is disputed, and is discussed in detail infra at pages 226-228, 229 [Pgs. 35a-43a]. The provision reads, in its entirety:

> The antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12) do not apply to discussions or agreements between a motor common carrier providing transportation of household goods subject to the jurisdiction of the [Interstate Commerce] Commission under subchapter II of chapter 105 of this title and its agents (whether or not an agent is also a carrier) related solely to (1) rates for the transportation of household goods under the authority of the principal carrier, (2) accessorial, terminal, storage, or other charges for services incidental to the transportation of household goods transported under the authority of the principal carrier, (3) allowances relating to transportation of household goods under

It has also been common in the industry, in addition, for many agent companies to hold their own, separate interstate authority from the ICC. E.g., PSF ¶¶ I-E, I-G; DRPF ¶¶ I-E, I-G; See Practices of Motor Common Carriers of Household Goods (Agency Relationships, 115 M.C.C. 628, 629 (1972) (hereinafter referred to as "Practices"). Agent companies that hold such independent authority in their own right are termed "carrier-agents"; agents that hold no such independent authority are termed "non-carrier" agents. Practices, supra, at 629. While a non-carrier agent

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the authority of the principal carrier, and (4) ownership of a motor common carrier providing transportation of household goods subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title by an agent or membership on the board of directors of any such motor common carrier by an agent. 49 U.S.C. § 10934(d) (1982).

accepts shipments solely as an agent for the principal van line that it serves, a carrier-agent has more flexibility. It may, like a non-carrier agent, accept shipments for carriage on the account of its principal carrier. But a carrier-agent may also accept certain shipments for carriage on its own account - rather than that of the principal carrier for which it serves as an agent - when the distance of the shipment does not exceed the geographic range of its independent authority and when other factors render it profitable for the carrier-agent to do so. E.g. PSF ¶¶ V-H-V-J; DRPF ¶¶ V-H-V-J; see Practices, supra, at 629. A carrier-agent, in this fashion, simultaneously functions both as an agent of the principal van line that it serves, and, on certain shipments, as one of the van line's competitors, in that it may

shift to its independent account certain shipments that might otherwise have been carrier on the van line's account. E.g. PSF ¶¶ V-G, V-I; DSF ¶ 22; PSGI ¶ 22; see Practices, supra, at 629. Some carrier-agents, moreover, enjoy the distinct benefit of using van line personnel, van line uniforms and equipment (with van line insignia), and van line origin and destination servies even on shipments carried out on their own, independent authority, e.g., DSF ¶¶ 24-29; PSGI ¶¶ 24-29; see Plaintiffs' App. G, and thus can avoid the costs of building the business infrastructure necessary to exercising their independent carrier authority effectively. See DSF ¶ 27; PSGI ¶ 27. Atlas carrier-agents, for example, enjoyed this latter benefit prior to the events at issue in this lawsuit. DSF ¶¶ 24-29; PSGI ¶¶ 24-29.

Federal law has long given special immunity from the antitrust laws to carrier-agent relationships, but only if 1) the van line and its carrier-agents enter into a "pooling agreement" that spells out the division of business, sharing of facilities, and other terms according to which the van line will allow its "agents" to compete with it, and 2) the pooling agreement meets ICC approval. See 49 U.S.C. §§ 11341-11342 (1982); Practices, supra, at 633. Significantly, a pooling agreement may be terminable unilaterally by either the national van line, or its carrier-agents, and the exercise of this option eliminates the automatic antitrust immunity that a carrier-agent relationship otherwise enjoys. See DSF ¶ 24; PSGI ¶ 24. Atlas entered into a pooling agreement in 1957, which set the terms according to

which, thereafter, it allowed its agents to acquire and operate their own independent ICC authority. DSF ¶24; PSGI ¶ 24. Other van lines, by contrast, have declined to enter into pooling agreements at all, and indeed have traditionally chosen to employ only non-carrier agents. E.g., PSF ¶ III-I; DRSF ¶ III-I. Representatives of carrier-agents - where the van line uses them - may sit on a van line's board of directors just as do representatives of non-carrier agents, both pursuant to prior practice, e.g., PSF ¶ V-A; DRPF ¶ V-A, and under the more recently enacted federal antitrust exemption contained in 49 U.S.C. § 10934(d) (1982).[4]

Finally, it is a central feature of the van line industry that agents within

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4. See supra note 3.

a van line's infrasructure often must agree to provide their services only to that particular van line and to other agent companies within the van line's network. See, e.g., PSF ¶ V-Q; DRPF ¶ V-Q; Plaintiffs' App. G. As in many other industries, "exclusive dealing" is a common method of operation. See Plaintiffs' App. G, at 1-3. For van lines that have exclusive dealing arrangements and that utilize only non-carrier agents, thus, only shipments on the van line's own account are carried within the van line's infrastructure. For van lines that have exclusive dealing arrangements and that use carrier-agents as well as non-carrier agents, however, non-van line shipments originating from the carrier-agents' independent operations may be carried within the van line's infrastructure as well. The establishment of

such arrangements for the benefit of a van line's carrier-agents is a matter of voluntary accommodation on the part of the van line - though once established, it may be governed by the van line's ICC-certified pooling agreement. See, e.g., DSF ¶ 24; PSGI ¶ 24; see Practices, supra, at 633. Nonetheless, almost no van line, apparently, allows the agents within its network regularly to handle the traffic of any company that is not also one of the van lines' agents. E.g., DSF ¶22; PSGI ¶ 22; see Plaintiffs' App. G.[5]

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5. Agent operations for handling government or military traffic or exercising freight forwarding authority as referred to at PSGI ¶ 22 constitute separate categories of business carried out under separate ICC authorities. See Atlas Van Lines, Inc., et al. - Pooling Application, ICC Docket No. MC-F-15004 at 1-5 (July 15, 1983) (Defendant's Evidentiary and other Materials 17). While such shipments may also be carried within a van line's infrastructure, operations

Prior to the deregulation of the moving industry beginning around 1979, the extent to which agents could and did make use of independent ICC authority - if their van lines allowed them to do so at all - was limited. DSF ¶ 23; PSGI ¶ 23. First, then-existing ICC regulations made it very difficult for non-carrier agents to obtain, or for existing carrier-agents to augment, their own interstate authority. DSF ¶ 35; PSGI ¶ 35. Second, even for agents that did possess such authority, it was usually - due to ICC regulations - of limited geographic scope. DSF ¶ 35; PSGI ¶ 35. Most important, the ICC required that carrier-agents use the same rates for their "independent carrier" shipments as

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under these ancillary authorities are not affected by the Atlas policy being challenged in this suit and thus are not at issue.

their "independent carrier" shipments as for their "agency" shipments-that is, price competition between van lines and the independent operations of their carrier-agents was expressly barred. DSF ¶ 36; PSGI ¶ 36.

The advent of deregulation in the moving industry represented a dramatic change in these business circumstances. With deregulation, agents could obtain independent interstate authority or expand existing interstate authority quite easily. DSF ¶ 35; PSGI ¶ 35. By the same token, independent carriers and local moving companies wishing to offer interstate service could readily obtain their own interstate authority rather than associating with a national van line in order to do so. Also, the ICC no longer imposed narrow geographic limits on the scope of such new authority.

Agents, as well as independent carriers, could obtain authority allowing them to carry goods on their own account not only locally, but regionally or even nationally as well. See DSF ¶35; PSGI ¶ 35. Moreover, and perhaps most significantly, the ICC abandoned the rule that carrier-agents were required to charge identical rates on their agency and non-agency shipments. DSF ¶ 36; PSGI ¶ 36.

Thus, as a result of deregulation, Atlas faced the prospect of potential Atlas shipments being shifted to independent carrier-agent accounts 1) by many more agents than before, 2) on long distance hauls as well as local hauls, and 3) with greater frequency due to newly authorized price competition from its carrier-agents in their independent capacities. See PSF ¶¶ VI-V-VI-X; DRPF ¶¶ VI-V-VI-X. Atlas carrier-agents,

nevertheless, continued to reap a substantial benefit from the use of the Atlas infrastructure-including Atlas-leased trucks, Atlas-trained personnel, Atlas uniforms, and the extremely valuable Atlas origin and destination network-on their own, independent, non-Atlas hauls. See, DSF ¶¶ 24-29; PSGI ¶¶ 24-29. After deregulation, moreover, this practice threatened to saddle Atlas with significant liability problems: as part of the deregulation of the industry, Congress made national van lines expressly liable for actions committed by an agent when the agent is operating "within the actual or apparent authority" of its principal van line. 49 U.S.C. § 10934(a) (1982). Thus, to the extent that the independent shipments of Atlas's carrier-agents were often carried out with many of the trappings of an official

Atlas shipment, the new liability provision placed Atlas at an enhanced, statutory risk of being held legally responsible for those non-Atlas shipments. See DSF ¶¶ 31-34; PSGI ¶¶ 31-34.

Atlas initiated several policies in anticipation of and in response to the changes accompanying deregulation, though it aborted each of these initiatives in turn until it finally settled on the policy at issue in this suit.[6] On Feb-

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6. See infra note 22. The successive initiatives were:

a) January 27, 1979. Atlas began to require that carrier-agents pay to Atlas one percent of their revenues from the use of their independent authorities, in compensation for the benefits they received from Atlas in aid of their independent operations. This requirement remained in effect until the last quarter of 1979. PSF ¶¶ VI-A-VI-B; DRPF ¶¶ VI-A-VI-B.

b) January 27, 1979. Atlas announced a policy -- effective immediately--prohibiting an agent from acquiring any new interstate authority or

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ruary 11, 1982, Atlas announced that it planned to exercise its right to cancel its pooling agreement, and that it would terminate its relationship with any agent company[7] that continued to operate an

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applying to add to his present interstate authority. Atlas states that despite its threats, it never enforced this policy, and publicly abandoned the policy by November, 1980. PSF ¶¶ VI-A, VI-C-VI-D; DRPF ¶¶ VI-A, VI-C-VI-D; DSF ¶ 45; PSGI ¶ 45.

c) November 1, 1980. Atlas approved a tentative plan to purchase the independent authorities of its carrier-agents. The plan was soon abandoned without implementation. PSF ¶¶ VI-F-VI-G; DRPF ¶¶ VI-F-VI-G.

d) March 20, 1981. Atlas announced a plan that allowed agents freely to hold, increase, and use independent authority (without necessarily setting up a separate carrier company), but that banned any use of Atlas agents for origin and destination services in connection with shipments under such independent authority. The plan was implemented on May 1, 1981. After ICC objection that the plan required a new pooling agreement, the plan was abandoned on May 21, 1981. PSF ¶¶ VI-H-VI-J; DRPF ¶¶ VI-H-VI-J.

7. Atlas's Agency Agreements state that they are terminable by either party upon

independent, interstate authority for its own account in addition to serving as an Atlas agent. PSF ¶¶ VI-K-VI-P; DRPF ¶¶ VI-K-VI-P. In effect, the policy meant that Atlas would thenceforth deal only with "non-carrier" agents. PSF ¶ VI-N; DRPF ¶ VI-N. Atlas indicated that its existing carrier-agents could retain their independent authority without being terminated as Atlas agents only if they transferred that authority to a separate corporation to be operated under a new and distinct name. PSF ¶ VI-N-VI-P; DRPF ¶¶ VI-N-VI-P; DSF ¶¶ 52-53; PSGI ¶¶ 52-53. Under the policy, the separate company could remain legally "affiliated" with the agency company -- that is, both companies could remain under common ownership. However, the separate company

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thirty days notice "without cause." PSF ¶ VI-Q; DRPF V-Q; Plaintiffs' App. I.

would be outside the Atlas network: it would generally not have access to Atlas origin and destination services provided by other Atlas agent companies around the country, PSF ¶ VI-M; DRPF ¶ VI-M, in that Atlas agent companies were contractually barred from providing such services for the shipments of non-Atlas companies to the extent that doing so would "infringe upon the exclusivity of representation which is a part of the agency agreement." PSF ¶ VI-N; DRPF ¶ VI-N.

Announcement of the new Atlas policy and its imminent implementation predictably triggered a challenge before the Interstate Commerce Commission. On August 16, 1982, in response to this challenge, the ICC inter alia affirmed Atlas's right to withdraw from its pooling agreement, holding that "nothing in [the] existing modified pooling agreement

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precludes withdrawal by any party from the agreement." Atlas Van Lines, Inc. - Pooling, ICC Docket No. MC-F-14784, Finance Docket No. 29972 at 3 (August 16, 1982) (Appendix A to Second Amended Complaint). On February 17, 1983, moreover, the ICC announced that the new arrangement proposed by Atlas did not require a new pooling agreement:[8] the ICC held that because the independent authority to be retained by the agents would be transferred to an entirely separate competitive entity outside of the Atlas network, no "pooling" between competitive carriers would be taking place and thus no pooling agreement was necessary. Atlas Van Lines, Inc. - Pooling, ICC Docket No. MC-F-14784, Finance Docket No. 29972 at 8-11

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8. Compare supra note 6, paragraph (d), where the ICC required a new pooling agreement.

(February 17, 1983) (Appendix B to Answer to Second Amended Complaint).[9]

Soon after Atlas announced its new policy, it contacted all of its agents by mail and asked them to respond by signing a form indicating whether or not they would comply with the new requirements for Atlas agency. PSF ¶¶ VI-S, VI-U; DRPF ¶¶ VI-S, VI-U. Most if not all of Atlas's agents eventually did respond, and the policy went into effect on August 18, 1983. At the time the policy was announced, Atlas had approximately 490 agents, 91 of whom were carrier-agents. Following implementation of the new

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9. Plaintiffs sought to have this determination reviewed in the Court of Appeals for this Circuit, but the appeal was dismissed by agreement without the Court of Appeals having ever reached the merits. See Rothery Storage & Van Co. v. Interstate Commerce Commission Agreement That Proceedings Be Dismissed (D.C. Cir. Nos. 83-1210, 83-1361) (Filed February 6, 1984).

policy, 48 of the carrier-agents shifted their independent authority to separate corporations, 20 gave up their authority entirely but remained as Atlas agents, 12 were terminated by Atlas for failure to comply with the policy, and 11 chose to leave Atlas either to operate on their own or to become carrier-agents for one of the other national carriers. DSF ¶ 82; PSGI ¶ 82. In February, 1984, Atlas imposed on its reconstituted agents an enhanced system of fines to enforce its prohibition against shipment of non-Atlas hauls on Atlas-leased trucks, given that under the new arrangement, as noted, the use of Atlas's service and equipment infrastructure was intended to become restricted to Atlas shipments alone. See PSF ¶ VI-AA; DRPF ¶ VI-AA; Plaintiffs' Motion to Further Supplement Summary

Judgment Pleadings, Attachment A (February 24, 1984).

Plaintiffs argue that the institution of the new Atlas policy represents a "boycott" of those Atlas agent companies that failed to comply, and that the Atlas policy constitutes price-fixing because it is aimed at preventing price-cutting by carrier agents in their independent capacities. As such, plaintiffs argue that Atlas's policy should be treated as a per se violation of the antitrust laws, and that even if the policy does not merit per se treatment, it nevertheless should be condemned under the rule of reason. Defendant responds by arguing that undisputed facts establish that 1) the institution of the policy is statutorily immune from the antitrust laws under 49 U.S.C. 10934(d), 2) per se treatment, as urged by the plaintiffs, is

inappropriate, and 3) no violation under the rule of reason can be shown.

II.

It is necessary at the outset to determine whether undisputed material facts make it possible to resolve this matter on the pending cross-motions for summary judgment. Under Fed.R.Civ.P. 56(c), a motion for summary judgment may be granted only when "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." It is well established that the undisputed facts and "inferences to be drawn" from those facts "must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962) (per curiam). To support summary judgment,

the record "must demonstrate that [the] opponent 'would not be entitled to [prevail] under any circumstances.'" National Ass'n of Governmental Employees v. Cambell, 593 F.2d 1023, 1027 (D.C. Cir. 1978) (quoting Semaan v. Mumford, 335 F.2d 704, 705 n. 2 (D.C. Cir. 1964)).

Courts have been cautioned to be especially careful about premature termination of a cause of action filed under the federal antitrust laws. Poller v. C.B.S., Inc., 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962). Nonetheless, summary judgment may well be appropriate even in an antitrust action where a court has permitted extensive discovery and the requirement of Fed.R.Civ.P. 56(c) have been met. See First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289-90, 88

S.Ct. 1575, 1592-93, 20 L.Ed.2d 569 (1968). In this case, both parties have moved for summary judgment, and their respective statements of undisputed material fact demonstrate that plaintiffs and defendant are in substantial agreement on the essential facts making up the core of this case.[10] On the basis of these facts, the Court concludes that the motions for summary judgment are ripe for disposition.

III.

In order to prevail on a claim under Section 1 of the Sherman Act, a plaintiff must show both 1) the existence of a "contract, combination ... or conspiracy," and 2) an unreasonable restraint of trade under either the per se or the rule of reason, as appropriate.

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10. See supra note 2.

Title 15 U.S.C. § 1 (1982); see ABA Antitrust Law Developments at 2 (2d ed. 1984). The undisputed facts demonstrate that plaintiffs in this action cannot meet either of these criteria.

A. Conspiracy

Plaintiffs argue that a conspiracy to effectuate the Atlas policy in question existed 1) among the members of the Atlas board of directors, who voted to institute the policy, and 2) between Atlas and its agents in the field, who responded to Atlas's request for an indication of whether the agents would comply with Atlas's demands.

[1] As to the alleged conspiracy among the members of the Atlas board of directors, it is firmly established that the actions of a corporation's board of directors do not constitute a conspiracy within the meaning of Sherman Act § 1.

See Copperweld Corp. v. Independence Tube Corp., ___U.S.___, 104 S.Ct. 2731, 2741 & n. 15, 81 L.Ed.2d 628 (1984); Harvey v. Fearless Farris Wholesale, 589 F.2d 451, 455 n. 7 (9th Cir. 1979). A corporation, which can only function pursuant to the group decisions of the members of its board of directors, cannot in this fashion be found to have conspired with itself. See Neldon Radio & Supply Co., v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952), cert. denied, 345 U.S. 925, 73 S.Ct. 783, 97 L.Ed. 1356 (1953). An exception to this rule may exist, however, where individual members of the board of directors possess an independent personal stake in a particular action of the board, that is, where they act "on their own behalf." Copperweld, supra at n. 15; accord Smith v. Northern Michigan Hospitals, Inc., 703 F.2d 942, 950 (6th

Cir. 1983). Plaintiffs attempt to invoke this exception on the ground that Atlas's board of directors included the executives of some Atlas's own agents and carrier-agents, which are separate corporate entities, independent from Atlas and from each other; plaintiffs argue that the new Atlas policies would necessarily affect both the Atlas and non-Atlas business potential of these separate companies in some fashion and thus give the agent companies on the board an independent stake in whether the policy was adopted.

In an effort to illustrate and substantiate this claim, plaintiffs allege more specifically that one non-carrier agent represented on the board received a 2% royalty from Atlas for every shipment carried on Atlas's account within a certain geographic area, and thus stood to

benefit individually from the adoption of the new policy because the new policy would predictably cause tonnage previously carried on the independent accounts of Atlas's carrier-agents to be shifted to Atlas's own account. Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment, at 10-12. Plaintiffs also observe that at least one carrier-agent represented on the board subsequently sought to benefit from the policy by competing more vigorously for the business of an agent that was experiencing difficulty complying with the new Atlas policy. Id. at 8-10. Thus, plaintiffs argue that in voting for the Atlas policy at issue, the executives of Atlas's agent and carrier-agents who served on Atlas's board had a sufficiently independent stake to render their participation in the decision a con-

spiracy within the meaning of the Sherman Act.

[2] There exist two independently sufficient grounds for rejecting plaintiff's claim. The first is that even if the allegedly conflicting interests of some directors sufficed to trigger the "personal stake" exception, Congress has provided a special exemption from the antitrust laws that would preclude liability on account of the alleged agreement in question. Title 49 U.S.C. § 10934 provides, in pertinent part, that

> d) The antitrust laws ... do not apply to discussions or agreements between a motor common carrier ... and its agents (whether or not an agent is also a carrier) related solely to... (4) ownership of a motor common carrier ... by an agent or membership on the board of directors of any such motor common carrier by an agent.

(emphasis added). Defendant acknowledges that the agent companies represented on

the board are separate entities from each other and from Atlas. Thus, the non-carrier and carrier-agents alike presumably possess at least some degree of interest in the success of their own companies, which on occasion may diverge from those of Atlas in general and other Atlas agents and carrier-agents individually. However 49 U.S.C. 10934(d) does not retain any "personal stake" exception. Rather it expressly allows agents and carrier-agents of a van line to serve on the van line's board of directors, participate in its deliberations and decisions, and exercise responsibility for the affairs of the principal free of the risk of antitrust liability for doing so, despite their obvious status as independent entities with at least these basic independent interests. See infra note 11. The statute, moreover, specifi-

cally immunizes "discussions and agreements" regarding the "ownership of motor common carriers by a van line's agents. The legislative history of this provision clarifies that it was intended to "immunize carriers and their agents from the antitrust laws with respect to certain dealings between them." S.Rep. No. 497, 96th Cong., 1st Sess. 8 (1979).[11]

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11. The relevant Senate report language reads in full:

> There is also a provision in the act that immunizes carriers and their agents from the antitrust laws with respect to certain dealings between them. This section is needed in order to permit the continued relationships developed and approved over the years of certain van line companies. In some cases, van line companies are composed and owned by agents who themselves are carriers within limited geographical areas. In some cases, the agents, as carriers themselves, have independent authority to operate in areas in which the principal carrier also may operate. Accordingly, in the absence of immunity, there could

Congress's aim, in particular, was to

> "assure [] that discusions between a principal carrier and its agents related solely to [inter alia] ... pooling or divisions between the principal carrier and its agents ... and ownership of a principal carrier by an agent ... are not discussions that would be in violation of the antitrust laws."

S.Rep. No. 497, 96th Cong., 1st Sess. 17 (1979). Discussion, voting, and agreement within the board on a policy announcing the terms that are to govern such

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> be some problems concerning immunity from the antitrust laws. The bill merely permits existing relationships to continue....

S.Rep. 497, 96th Cong., 1st Sess. 8 (1979) (emphasis supplied).

Analogous language in the House Report on this legislation reads:

> New sections 10934 also contains a provision which immunizes from the antitrust laws certain discussions exercise [sic] agreements between carriers and their agents related to rates, charges, and allowances for transportation provided under the authority of the carriers. Further, such discussions and agreements related to the ownership of a car-

ownership as well as the policy's inplementation - as, it is undisputed, occurred in this case - seem to fall squarely within the language and intent of this

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> rier by an agent or membership on the carrier's board of directors by an agent are immune. The purpose of this provision is to allow the continuation of certain relationships between carriers and agents which have been established over the years. In some cases, the carriers are composed and owned by agents who themselves are carriers within limited geographical areas. In other cases, the agents, as carriers themselves, have independent authority to operate in areas in which the principal carrier operates. These relationships could be jeopardized in the absence of antitrust immunity. It is important to note that these exemptions are narrow ones. Specifically, the immunity provided by subsections (d)(1)-(3) applies only to discussions or agreements related to rates, charges, and allowances offered on traffic carried under the authority of the principal carrier. Similarly, subsection (d)(4) provides only a limited exemption. It does not exempt from the antitrust laws such things as anticompetitive mergers.

H.Rep. 1372, 96th Congress, 1st Sess. at 10 (1979) (emphasis added)

statutory exemption. The exemption provision, it must be noted, was enacted into law as an explicit component of Congress's deregulation package. Thus, Congress may fairly be understood as anticipating discussions and agreements after deregulation which addressed adjustments of the pre-existing relationships to the new business environment. The material discussions and agreements at issue in this case related solely to whether "pooling" between Atlas and its agents would continue after deregulation, and, if not, to how the ownership of a principal carrier by an agent could be accomplished. Thus, the claim that the actions of the Atlas board of directors in this matter constitute a conspiracy within the meaning of the Sherman Act must be rejected. Congress appears to have expressly exempted the participation

of agents and carrier-agents in the membership, deliberations, or agreements of a van-line's board of directors from the application of the antitrust laws where, as here, the subject matter of the discussions and agreements relates to the van line's policy with respect to the ownership of independent interstate authority by the van line's agents, including policies requiring change because of the business consequences of deregulation.

Plaintiffs argue that the statutory immunity works only in one direction: i.e., that § 10934(d) immunizes decisions allowing agents to acquire independent authority and and become carrier-agents, but that it does not immunize a decision abolishing an existing carrier-agent arrangement. Statement of Points and Authorities in Support of Plaintiffs'

Motion for Partial Summary Judgment As To Liability at 12-14. The Court is well aware that Congress sought to ensure that carrier-agent arrangements would not be prohibited as a result of deregulation. However, Congress did not command that they be preserved, nor prohibit their abandonment. Under plaintiffs' view of §10934(d), national van lines that prior to deregulation had permitted their agents to operate as carrier-agents would essentially be locked into that arrangement, while those that had not allowed their agents to obtain independent authority from the ICC would presumably be free to continue that policy. Yet there is nothing in the legislative history to support such an arbitrary result; indeed, the legislative history appears, if anything, to reaffirm the right of a van line to enforce traditional agency

standards of loyalty and fiduciary duty upon its agents, as discussed below, and thus plaintiffs' argument must be rejected. See infra at page 232 [pgs. 62a-65a] & note 17.

[3.] Alternatively, plaintiffs' effort to establish that the actions of the Atlas board of directors constituted a conspiracy within the meaning and scope of the Sherman Act must also fail in that - even apart from the availability of statutory immunity - plaintiffs do not proffer evidence or demonstrate a reasonable prospect that they could proffer or prove specific facts sufficient to invoke the "personal stake" exception.

The antitrust laws look to substance, not to form. As noted, it may be inferred that each agent on the Atlas board of directors may well possess some independent interest in its own success

apart from that of Atlas or its fellow agents, and that the benefits and detriments of the new policy may well accrue to each of them in a possibly distinct way. Yet other courts have observed that as long as employees or officers of a corporation have acted in accordance with their responsibility and authority to advance the interests of the corporation they serve - and where plaintiffs have failed to proffer specific facts to the contrary - no conspiracy within the meaning of the Sherman Act can be found. See Green v. Associated Milk Producers, Inc., 692 F.2d 1153, 1156-57 (8th Cir. 1982); Nelson Radio & Supply Co. v. Motorola, supra, at 914. In the leading case supporting the existence of a "personal stake" exception, the personal interest in question was divergent from and possibly inconsistent with the corporate

officer's responsibilities toward the corporation that the officer served. See Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391, 399-400 (4th Cir. 1974) (cited in Copperweld, supra, at 2741 n. 15). In Greenville, the plaintiff alleged the existence of a conspiracy between a newspaper and the newspaper's own president to eliminate the plaintiff from the local newspaper advertising market. The Court held that a sufficient "personal stake" was alleged in that the president held a direct financial interest in yet another local newspaper that would benefit from the increased advertising that it too would gain as a result of the plaintiff's elimination. A newspaper president's interest in a completely unrelated paper is, on its face, wholly divergent from and possibly inconsistent with the

president's presumed responsibilities toward the newspaper of which he is president. In the instant case, by contrast, the separate agent companies are part and parcel of Atlas's own network. Atlas's success is to a large extent dependent upon - rather than divergent from or inconsistent with - the success of its agent companies, either individually or as a group. And after voluminous discovery, plaintiffs have failed to proffer any facts showing that the agent and carrier-agent votes on the Atlas policy were grounded in interests that were inconsistent with or divergent from the overall best interests of Atlas itself.[12] The "personal benefits"

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12. The insistence on such a showing is further supported by principles recently set forth by the Supreme Court's decisions in Monsanto Co. v. Spray-Rite Service Corp., ___ U.S. ___, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), and

alleged - increased royalties due to increased Atlas traffic, and increased bases for competition with other Atlas agents - are wholly consistent with the unitary interests of Atlas and its agents to build a strong Atlas system. A stockholder/director of a company, for

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Copperweld, supra. In Monsanto, the Court indicated that a finding of conspiracy could not be sustained on the basis of evidence merely "consistent" with illegal coordination between a manufacturer and its independent distributors. Rather, a plaintiff must proffer specific evidence "inconsistent" with the defense of unilaterality. Monsanto, supra, at 1473. An analogous distinction provided the basis of the decision in Copperweld, where the Court rejected the proposition that a corporation can conspire with its separately incorporated but wholly owned subsidiary. Copperweld, supra, at 2742-45. The Court observed that "Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition," id at 2741, or, in other words, that the challenged behavior was, by itself, just as "consistent" with the "effort to compete," legitimately, as it was with the "effort to stifle competition." The Court thus seems to suggest that in such circumstances, the antitrust laws can only be triggered by proffering

example, does not hold an impermissible personal benefit or act "on his own behalf" simply because his effort to advance the interest of the corporation would increase the value of his stock interest and the dividends paid to him.

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evidence of behavior "inconsistent" with otherwise legitimate purposes.

In the instant case, thus, the mere showing of a "personal benefit" traceable to an agent on the Atlas board of directors should not suffice to trigger the "independent stake" exception - assuming one exists - unless plaintiffs also proffer evidence showing that the personal benefit in question was inconsistent with or divergent from Atlas's own competitive interests. There is a longstanding presumption that the members of a corporation's board of directors are incapable of conspiring with themselves under the Sherman Act in that there is no other way that a corporation can advance its competitive interests, *see Nelson Radio*, *supra*, and, thus, the Court is reluctant to find that the plaintiffs have demonstrated the existence of "the plurality of actors imperative for a § 1 conspiracy," *Copperweld*, *supra*, at 2741, without a proffer of evidence suggesting that the personal benefits derived from the board's actions were inconsistent with or divergent from the interest of Atlas itself.

Here, similarly, careful evaluation of the facts proffered by plaintiff shows only that any advantage to the stock holder/director/agent was merely incidental to the advantage to the corporation, rather that inconsistent with or divergent from Atlas interests or with the Atlas agent/directors' responsibilities toward Atlas. See also Card v. National Life Insurance, 603 F.2d 828, 834 (10th Cir. 1979). After considerable discovery, plaintiffs have not shown any reasonable possibility of proving otherwise. Plaintiffs, therefore, have failed to demonstrate any likelihood of proving the existence of a conspiracy within the Atlas board of directors or between the board and Atlas itself, for this reason as well as for the statutory immunity ground noted previously.

As to the alleged conspiracy between

Atlas and its agents in the field, plaintiffs rely heavily on the fact that, soon after announcing its new policy, Atlas requested that its agents respond by indicating whether they would comply with the policy's terms. Plaintiffs contend that this communication represents negotiation or agreement, and as such satisfies the "conspiracy" requirement of their Sherman Act § 1 claim.

[4] Again, there are two reasons for rejecting plaintiffs' claim. First, even if Atlas's communication with its agents did constitute an "agreement," such activity appears also to be immunized from the antitrust laws under 49 U.S.C. § 10934(d). As noted, that provision expressly immunizes "discussions and agreements" between a van line and its agents relating to "ownership of a carrier by an agent." Atlas's effort to

determine the intentions of its agents in response to the announcement of its change in policy regarding the ownership of independent carrier authority by its agents falls squarely within the language and intent of the statutory exemption. See supra pages 226-228. [pgs. 35a-43a]

[5] Alternatively, even apart from the availability of such statutory immunity, plaintiffs have not proffered facts sufficient to establish a vertical conspiracy. Plaintiffs have not demonstrated, nor does it appear that they can demonstrate, that Atlas's actions amounted to anything other than the unilateral annoucement of a policy change and its subsequent implementation. The Supreme Court, in its last term, reaffirmed that "[a] manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long

as it does so independently." Monsanto Co. v. Spray Rite Service Corp., ___ U.S. ___, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775 (1984). The same principle applies in a case such as this one.[13] As the analysis in Spray-Rite makes clear, plaintiffs here can only succeed in showing a conspiracy by offering specific, direct evidence inconsistent with the defense of unilaterality and indicating that Atlas and its agents had a "conscious commit-

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13. In Spray-Rite, supra, the Supreme Court confirmed the vitality of United States v. Colgate & Co., 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919). As the Court explained:

> Under Colgate, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.

Spray-Rite, supra, at 1469. The Colgate/Spray-Rite doctrine applies to non-price terms of dealing - such as those in this case - as well.

ment to a common scheme designed to achieve an unlawful objective." Id. at 1473. While plaintiffs demonstrate that Atlas kept in regular touch with its agents - informing them of the substance of the policy and seeking to elicit responses - such actions are wholly consistent with good management and planning. Cf. id. at 1470. Despite extensive discovery, on the other hand, plaintiffs offer no evidence inconsistent with the proposition that the policy announcement and implementation was a unilateral act on Atlas's behalf.

Plaintiffs, thus, have failed to demonstrate that the actions of the agents on Atlas's board of directors or in the field can in any way be deemed to constitute a conspiracy within the meaning or scope of Section 1 of the Sherman Act.

B. Unreasonable Restraint of Trade

Even if plaintiffs were able to satisfy the "conspiracy" requirement necessary to establish a Sherman Act § 1 violation, plaintiffs would still have to establish that Atlas's policy constituted an "unreasonable restraint of trade." Plaintiffs stress that the immunity granted by Congress with the enactment of 49 U.S.C. § 10934(d) was meant to be a "limited" one and was not intended to protect "such things as anticompetitive mergers," H.Rep. 1372, 96th Cong., 1st Sess. 10 (1979). Plaintiffs argue that the competitive restraint imposed by the Atlas policy must therefore be evaluated in any event to determine whether it might fall outside of the immunity provision's intended scope.

Assuming, arguendo, that a conspiracy has been demonstrated and that no

statutory immunity applies, the Court would next have to determine whether to apply "per se" treatment to the evaluation of the practice in question, as urged by plaintiffs, or whether to apply the "Rule of Reason", as urged by defendant.

1) Per se treatment.

[6.] Plaintiffs contend, as indicated above, that the institution of the new Atlas policy represents a "boycott" of those Atlas agents who refused to comply with the policy, and that it also represents a "price-fixing" scheme, in that it is allegedly aimed at preventing price-cutting by carrier-agents in their independent capacities.[14]

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14. Plaintiffs theorize that the new policy tended to cause either of two outcomes: 1) agents abandoned or failed to seek independent authority under which they might have charged lower prices for moving services comparable to those that

Boycotts and price-fixing schemes, when proven, have often been accorded per se treatment.[15] Nonetheless, the Court of Appeals of this Circuit has warned that

> A per se rule is a judicial short-cut; it represents the considered judgment of courts, after considerable experience with a particular type of restraint, that the rule of

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they were providing as Atlas agents, or 2) agents transferred their independent authority to separate corporations, and the additional cost of doing so dampened their ability to charge lower rates on the independent shipments.

15. As noted, it is typical in the moving industry for the agents of a van line to enter into exclusive dealing agreements with the van line; i.e., they agree not to provide van line services to any company that is not also an agent of the van line that they serve. Plaintiffs argue that this practice should in this case be treated as an antitrust violation because it is an integral part of Atlas's alleged boycott and price maintenance schemes. Though exclusive dealing arrangements are traditionally treated under the Rule of Reason, plaintiffs contend that here they should be treated as part of Atlas's other per se violations.

reason - the normal mode of analysis - can be dispensed with. As the Supreme Court explained in Northern Pacific Railway Co. v. United States, "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." A court will not indulge in this conclusive presumption lightly. Invocation of a per se rule always risks sweeping reasonable, pro-competitive activity within a general condemnation, and a court will run this risk only when it can say, on the strength of unambiguous experience, that the challenged action is a "naked restraint [] of trade with no purpose except stifling of competition."

The Supreme Court emphasized the "demanding standards" of Northern Pacific Railway last term in Continental T.V., Inc. v. GTE Sylvania, Inc. Reiterating that "[p]er se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive," the Court overruled Arnold, Schwinn & Co., which had held certain vertical restraints illegal per se. The Continental Court noted that the vertical restrictions in question possessed "redeeming virtues" in their stimulation of inter-brand competition; that the restrictions were "widely

> used in our free market economy"; and that there existed "substantial scholarly and judicial authority supporting their economic utility." For these reasons, the Court held that the restraints at issue were to be analyzed not under a per se rule, but under the rule of reason.

Smith v. Pro-Football, 593 F.2d 1173, 1181 (D.C. Cir. 1978) (footnotes omitted).

In Smith v. Pro-Football, the Court of Appeals refused to apply the per se rule in its evaluation of the NFL player draft. In this case, the Court similarly declines to apply the per se rule in evaluating Atlas's response to the changes accompanying deregulation of the household goods moving industry. Deregulation abruptly re-organized the rules at the foundation of the moving industry. Analysts are still examining the impact of these changes. See Plaintiff's App. P, Q. No court has apparently yet closely analyzed the unique nature of the

business relationship between van lines and their carrier-agents, at least as the relationship affects the carrier-agents' exercise of their independent authority.[16] "Considerable" and "unambiguous" experience with the practice at issue is a necessary prerequisite for application of per se treatment, and the Court finds that - given the unusual nature of the van line/carrier-agent relationship, and given the general confusion following deregulation - such

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16. Cf. North American Van Lines, Inc. v. I.C.C., 666 F.2d 1087, 1094-96 (7th Cir. 1981) (van line challenge against ICC regulations implemented after deregulation) ("There was no evidence before us regarding the customary arrangements ... between national carriers and their agents."); Clemmer v. North American Van Lines, Inc., 1969 Trade Cases ¶ 72,936, at 87609 (E.D.Pa. 1969) (van line's allocation of exclusive territories between agents deemed not in violation of the antitrust laws) (policy in question did not affect carrier-agents' independent shipments).

experience is simply absent in the present case. Moreover, the Atlas policy allows agents the option of retaining their independent authority in separate companies, or becoming carrier-agents of a different van line, and thus the Court is reluctant to term the policy as "pernicious." Also, it simply cannot be accepted that the new Atlas policy has "no purpose except the stifling of competition" or that it is without "any redeeming virtue." Plaintiffs cannot reasonably dispute that Atlas was fully within its rights when it terminated its pooling agreement, or that Atlas's new policy will enhance inter-carrier competition among the national van lines, as explained below. Finally, it is worth noting that the new Atlas policy represents nothing more than the adoption of a method of operation - exclusive agency -

that is "widely used" not only in the van line industry, but throughout commerce. In sum, the Court finds that the "demanding standards" for application of per se treatment have simply not been met. Rather, "the courts have had too little experience with this type of restraint, and know too little of the "economic and business stuff" from which it issues, confidently to declare it illegal without undertaking the analysis enjoined by the rule of reason." Id at 1182 (footnote omitted).

2) Rule of Reason.

[7] Plaintiffs argue that the initiation of Atlas's new policy can be condemned even under the rule of reason. Guidance may once again be taken from the opinion of the Court of Appeals of this Circuit in Smith v. Pro Football, supra, where the Court of Appeals stated that:

> Under the rule of reason, a restraint must be evaluated to determine whether it is significantly anticompetitive in purpose or effect. In making this evaluation, a court generally will be required to analyze "the facts peculiar to the business, the history of the restraints, and the reasons why it was imposed." If, on analysis, the restraint is found to have legitimate business purposes whose realization serves to promote competition, the "anticompetitive evils" of the challenged practice must be carefully balanced against its "procompetitive virtues" to ascertain whether the former outweigh the latter. A restraint is unreasonable if it has the "net effect" of substantially impeding competition.

Id at 1183.

This memorandum has already described the "facts peculiar to" the van line and moving industry, and the recent legislative and regulatory changes leading to the new Atlas policy. Prior to deregulation, Atlas had given its carrier-agent companies permission to use the Atlas infrastructure to compete with Atlas itself, for their own accounts,

within the boundaries set by federal regulations and ICC oversight. Classic agency law, however, gives a principal the prerogative of withdrawing such permission if convenient to protect the principal's interests. See Restatement of Agency, Second §§ 1(1), 14N, 393-394. Nothing in the legislative history of Congress's deregulation of the household moving goods industry suggests that when Congress removed the regulatory restrictions on carrier-agent independent operations, it added a restriction barring van lines from exercising this prerogative. Indeed, the legislative history of the measure shows just the opposite: that Congress had no intention of disturbing the ability of a van line to reach agreements enforcing "the fiduciary duty of loyalty of an agent not to compete with its principal concerning the subject

matter of the agency." S.Rep. 497, 96th Cong., 1st Sess. 8.[17] Congress may well

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17. The Senate Report discussion of this matter reads in full:

> During the course of its deliberations, the Committee considered a proposal to include within the immunity section language that would grant immunity to agreements concerning exclusive agency representation, or the fiduciary duty of loyalty of an agent not to compete with the principal concerning the subject matter of the agency. The Committee determined that this type of relationship is not a violation of the antitrust laws and is standard agency law as expressed in section 393 of the Restatement of the Law of Agencies section. The Committee felt that inclusion of such language could imply that such relationships are a violation of the antitrust laws in the absence of immunity. Thus, the Committee determined not to include such language in the bill.

S.Rep. 497, 96th Cong., 1st Sess. 8 (1979). Neither party makes any issue of the portion of this passage explaining that "the Committee determined not to include" language in the bill that might have immunized exclusive agency or fiduciary duty agreements directly. Thus, it is not necessary to resolve any questions

have speculated that by widening the regulatory boundaries on carrier-agent independent operations, it would have triggered more independent operations of that sort. However, when it lifted those restrictions, it did so - consistent with the free market philosophy supporting deregulation in general - to create an option, not a mandate.[18] Congress, thus,

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that might arise from the fact that such language was consciously excluded. However, the Court is inclined to agree with the observation of the Senate Committee that "this type of relationship is not a violation of the antitrust laws," id. Cf. Delta Data Systems Corp. v. Webster, 744 F.2d 197 at 201-202 (D.C. Cir. 1984) (valid to consider GAO report as persuasive even if not binding).

18. The House Report on the legislation states, under the heading "Section 2. Declaration of Policy," that:

> Section 2 sets forth congressional policy with respect to the household goods moving industry. The emphasis in the policy statement is threefold - the reduction of unnecessary regulation, the strengthening of consumer remedies and protections, and

left each individual van line free to fashion its own response to deregulation - or, in Atlas's case, to the prospect of widescale price competition from its own agents using the van line's own infrastructure. Atlas's choice was to protect against the further diversion of its own business infrastructure in this fashion, and instead to strengthen its competitive position by returning to a traditional agency arrangement whereby its agent companies serve Atlas alone. As such, the new Atlas policy plainly had a legitimate business purpose, and is consis-

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> the establishment of maximum carrier flexibility in pricing their services and meeting the needs of their shippers.

H.Rep. 1372, 96th Cong., 1st Sess. 5 (1979) (emphasis added). See also S.Rep. 497, 96th Cong., 1st Sess. 8 (1979) ("the bill merely permits existing [carrier-agent] relationships to continue." (emphasis added)

tent with policies chosen by Congress with respect to the choice between regulation and competition in this industry.

In an effort to identify the "anti-competitive evil" of the challenged practice, plaintiffs stress that, upon the implementation of the new Atlas policy and the resultant withdrawal of access to Atlas services and equipment for use on independent shipments, several carrier-agents ceased their independent operations entirely. Others adapted by shifting their independent authorities to separate corporations or abandoning Atlas to become carrier-agents for some other major van line, and plaintiffs adduce facts showing that these latter groups of agents incurred significant expense in doing so.

One of the basic tenets of the federal antitrust laws, however, is that

they are intended to protect competition, not competitors. Copperweld, supra, at 2740 n. 14. The Court must look not to whether individual agents incurred losses as a result of the new policy, but rather to the extent to which the Atlas policy somehow impeded the opportunity of Atlas agents to utilize their independent authority in the market for moving services. On this score, it is necessary to reiterate that the new Atlas policy does not absolutely bar an Atlas agent from exercising independent interstate authority. The agent company itself must serve Atlas alone, but agents may exercise independent authority if that authority is placed in an affiliated but commmercially separate company. Because the separate company must develop its own service and equipment infrastructure, the true effect of the Atlas policy is, in

essence, only to prevent agents who do exercise independent authority from appropriating to themselves any aspect of the Atlas network for the support services and overhead equipment necessary to operate that interstate authority beyond any great distance. The new arrangement essentially terminates a subsidy previously available to an Atlas carrier-agent at the expense of Atlas. At the same time, agents who wish to continue to operate as "carrier-agents" are not barred from seeking to join one of the other van lines that do subsidize carrier-agents in this way. Thus, the only enduring anticompetitive harm demonstrated by the plaintiff is the loss of the opportunity to continue to operate in a traditional carrier-agent relationship with Atlas itself.

In reaching this conclusion, the

Court has not overlooked the fact that Atlas has also required its carrier-agents to refrain from transferring their established names as Atlas agents to the corresponding non-Atlas affiliate companies created as a result of the carrier-agents' compliance with the Atlas policy. In any given case, this requirement bars the new, non-Atlas entity from access to the goodwill - as it is represented in the carrier-agent's established name - that has been built up as a result of the carrier-agent's Atlas relationship. At the same time, though, it also deprives the independent entity of any goodwill that might have been fairly allocable to it due to the carrier-agent's own independent operations. See DSF ¶ 58; PSG1 ¶58. The reasonableness of this feature of the Atlas policy may be viewed differently by different

courts. It passes muster here because plaintiffs have not proffered evidence that would indicate the relative burden that Atlas would have borne had it permitted its carrier-agents to transfer their established names to the new, non-Atlas entities, if the agents had so wished, as opposed to requiring its carrier-agents to give the new entities different names instead.[19] Indeed, even if there were such evidence, it would necessarily be speculative. And in addition, each carrier-agent, as noted, had the clear option of operating completely

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19. It is worth noting, in this regard, that one other major van line has determined to accept the costs of permitting its carrier-agents to shift their established names to such newly created separate entities. See DSF ¶ 79. Counsel for the defendant may themselves yet decide, out of an abundance of caution and in anticipation of a possible appeal, to recommend to Atlas the adoption of this more conservative approach.

independently, or of seeking to associate with another van line that would permit carrier-agent or independent operations under that name.

In judging the reasonableness of the Atlas policy, it should be noted that plaintiffs appear to have conceded that a van line is fully entitled to abandon its agency network altogether, or choose to operate exclusively with agents that have no independent interstate authority at all - i.e., no independent interstate authority either within the agency company or within a separate, affiliated company. See Transcript of Hearing, August 6, 1984, at 19-23. At least one major van line other than Atlas does indeed operate in such a manner.[20] The

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20. Plaintiffs themselves report that "Allied Van Lines, the largest van line, allows no firm affiliated with it to have or to use authority to conduct

arrangement now being enforced by Atlas, however, is one that is less extreme. Agents are expressly permitted to continue to operate their own, independent authority as long as it is located with an "affiliated" but separately incorporated company. The Court of Appeals for this Circuit faced an analogous situation in United States v. Studiengesellschaft Kohle, 670 F.2d 1122 (D.C. Cir 1981). That case involved the holder of a process patent who had granted licenses to several manufacturers, allowing all of them to use the process to produce products for their own use but allowing only one of them to sell the

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interstate operations competitive with its own. This arrangement was approved and immunized from the antitrust laws by the Interstate Commerce Commission in 1946, following an antitrust action suit, brought by the Justice Department. Evanston Fireproof Warehouse, et al. - Control Allied Van Lines, Inc., 46 M.C.C. 557 (1946)." PSF ¶ III-I.

resultant product in the open market. The plaintiff manufacturers challenged this "restraint." The Court of Appeals however, noted that the patent-holder was legally entitled to grant an exclusive manufacturing and sales license to a single licensee if he so desired, and that therefore the patent-holder could not be deemed to have acted "unreasonably" under the antitrust laws for having taken the less extreme step of licensing additional manufacturers subject to the condition that the resultant product be restricted to their own use. Id. at 1128-31, 1135. Similarly, if Atlas would be entitled to choose to continue doing business only with agents that possess no interstate authority whatsoever, then Atlas would presumably be entitled - without being found to have acted unreasonably - to take the less extreme

step represented by the Atlas policy in question.[21] See also Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001, 1006-07 (5th Cir.), cert. denied, 454 U.S. 827, 102 S.Ct. 119, 70 L.Ed.2d 102 (1981). Rather than choosing to do business only with agents who have no independent authority whatsoever, Atlas allows its agents to possess

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21. The court does not itself face the question, nor intimate any ruling, on whether indeed it would be valid under the antitrust laws for a van line to take the more extreme step of banning its agents even from having separate affiliates exercise independent carrier authority. Suffice it to note that plaintiffs, having conceded that a van line is entitled to take such extreme action, see Transcript of Hearing, August 6, 1984, at 19-23, are in no position to argue that Atlas's less extreme action is unreasonable. Given that Atlas bars only the exercise of independent authority by the agency companies themselves, the policy goes no farther than is necessary to enforce traditional agency standards upon the agent companies alone. The discussion above demonstrates the reasonableness of a policy that is limited in this fashion.

independent authority as long as they place it in a separate company and look elsewhere than to Atlas for the support and overhead services necessary to utilize that authority. It is difficult to regard this tempered action as "unreasonable" within the meaning of the Sherman Act, or to see what other proof plaintiffs could muster to change this conclusion.

Finally, to the extent that Atlas's policy has any legally cognizable anti-competitive effect, there stands balanced against it the plain and significant procompetitive impact on competition among the national van lines. Plaintiffs do not dispute in any material way that enforcing traditional agent loyalty upon Atlas agents will strengthen Atlas's competitive position vis-a-vis the other national van lines, particularly those

that already require their agents to work with them alone. Plaintiffs concede that carrier-agency reduced the amount of traffic carried on Atlas's account, PSGI ¶ 22, and cannot plausibly argue that carrier-agency did not or would not expose Atlas to increased liability - at least to some extent - for shipments carried out under Atlas's actual or apparent authority. See PSGI ¶¶31.34. Atlas's new policy eliminated these competitive vulnerabilities, and thus, as shown above, had a legitimate business purpose with a plain procompetitive effect. Therefore, considering the nature and overall competitive effect of the announcement and implementation of the new Atlas policy, the Court finds from undisputed facts that plaintiffs are unable to show that Atlas's actions

violated the rule of reason.[22]

IV

For the foregoing reasons, the Court concludes as a matter of law from undisputed material facts that defendant's actions in requiring its agents to refrain from independent carrier operations, except through separate corporate affiliates, does not violate Section 1 of the Sherman Act. Accordingly, an accompanying order will deny plaintiff's

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22. To the extent that plaintiffs' claims also challenge Atlas's earlier, aborted efforts to cope with the advent of deregulation, see supra note 6, the Court similarly finds that no violation of the rule of reason can be demonstrated. Even apart from whether the "conspiracy" requirement can be met as to these earlier Atlas actions, the Court finds that their short duration, the prerogative of Atlas to impose traditional agency standards upon its agents, and the procompetitive aim of the actions establish that they cannot be deemed "unreasonable" under the Sherman Act.

motion for partial summary judgment as to liability, and will grant defendant's motion for summary judgment.

Supreme Court, U.S.
FILED
DEC 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-734

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROTHERY STORAGE & VAN CO., *et al.*,
Petitioners,

v.

ATLAS VAN LINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR ATLAS VAN LINES, INC. IN OPPOSITION

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QUESTION PRESENTED

Whether the district court and Court of Appeals correctly held, on the undisputed facts developed after completion of liability discovery, that a moving van line's policy of prohibiting its agent companies from also engaging in competing interstate moving on their own account was not an unreasonable restraint of trade.

LIST OF PARTIES AND RULE 28.1 INFORMATION

While there were a number of additional parties at various earlier stages of the proceeding below in the district court, the only parties remaining in the Court of Appeals were eight of the original plaintiffs (Rothery Storage & Van Co.; A. Walecka & Son, Inc.; Camp Curtin Transfer, Inc.; J. Fishman & Son, Inc.; Richard Coriell & Company; Warsaw Moving & Storage, Inc.; ABC Relocation Services, Inc.; and Dobson the Mover)* and defendant Atlas Van Lines, Inc. (respondent here).

Respondent Atlas Van Lines, Inc. has no parent, subsidiary or affiliate whose securities are publicly owned.

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* A number of the plaintiffs did not appeal to the Court of Appeals. The Petition does not list the petitioners other than Rothery Storage & Van Co.; while it notes at page iv that "[p]etitioners * * * were appellants below," it does not indicate whether all of the appellants are petitioners.

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BRIEF FOR ATLAS VAN LINES, INC. IN OPPOSITION

OPINIONS BELOW

The opinion of the district court granting summary judgment for respondent (Pet. App. 47a) is reported at 597 F. Supp. 217. The majority and concurring opinions of the Court of Appeals affirming the district court (Pet. App. 1a and 42a) are reported at 792 F.2d 210.

STATEMENT

Petitioners ask this Court to review the Court of Appeals' unanimous affirmance (in two separate opinions)

of the district court's fully reasoned decision on cross-motions for summary judgment following completion of exhaustive liability discovery. Here, as below, there is no serious dispute as to the facts that the courts below found determinative.[1] The only possible question here is whether any legal issue warranting this Court's attention underlies the conclusion that the challenged "carrier-agent policy" of respondent Atlas Van Lines, Inc. ("Atlas") is not an unreasonable restraint of trade under Section 1 of the Sherman Act, 15 U.S.C. § 1.

A. Factual Background

Atlas is one of a substantial number of nationwide interstate common carriers of household goods. It is the sixth largest van line, with a national market share of less than 6 percent (Pet. App. 14a n.3).[2] Like the other major van lines, Atlas operates through a nationwide network of independently owned companies which Atlas has selected to act as its agents in moving shipments under

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[1] The district court found that "plaintiffs and defendant are in substantial agreement on the essential facts making up the core of this case" (Pet. App. 76a). In analyzing the statements of material facts filed pursuant to D.D.C. Local Rule 1-9(h) [now 108(h)], the district court noted that "[c]lose comparison of plaintiffs' assertions discloses that while many of them challenge the implications or characterizations of defendant's statements, they do not effectively traverse them so as to put material facts into genuine dispute." (Pet. App. 50a-51a n.2) Because the district court's opinion copiously refers to the undisputed facts in the record, our statement of facts here principally cites that opinion. The petition makes numerous assertions which distort the undisputed facts or are unsupported by evidence in the record, but they are largely immaterial and no purpose would be served by refuting them here. The Court of Appeals noted that petitioners' argument there took some improper liberties with the record. (Pet. App. 23a-24a n.9)

[2] The 1981 market shares of the 15 largest van lines are set out at Pet. App. 20a n.7.

Atlas' ICC authority (Pet. App. 51a-52a).[3] Standardized agency agreements require the agents to conform with operating procedures and standards specified by Atlas, which establishes rates and coordinates shipments (Pet. App. 51a-52a & n.2). The Court of Appeals accurately summarized as follows the relative roles of Atlas and its agents in the integrated enterprise:

> "The agents find customers and do the packing, loading, hauling, and storage. Atlas sets the rates, dispatches shipments, chooses routes, arranges backhauls so the agent's truck need not return empty, arranges services at the origin and destination of shipments, collects all revenues and pays the agents, establishes uniform rules for the appearance and quality of equipment, trains salespeople and drivers, purchases and finances equipment for use by the agents, and maintains insurance on all shipments made under Atlas' authority. In addition, Atlas conducts national advertising and promotional forums. With the assistance of agents, it handles customer claims." [Pet. App. 3a] [4]

The Interstate Commerce Act makes Atlas responsible to customers for "all acts or omissions of any of its agents which relate to the performance of household goods transportation services (including accessorial or terminal services) * * * and which are within the actual or apparent authority of the agent from the carrier * * *." 49 U.S.C. § 10934(a). Atlas is further required, as a "carrier providing transportation of household

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[3] Atlas was formerly a publicly owned corporation listed on the American Stock Exchange, but is now privately owned. A minority of Atlas' stock is owned by a few of its agents.

[4] The undisputed facts underlying this summary were set forth in ¶¶ 2-16 of Defendant's Statement Of Material Facts As To Which There Is No Genuine Issue ("DSF") and were not significantly contradicted by plaintiffs. See Pet. App. 50a-51a n.2. The separate opinions in the Court of Appeals did not differ in their views of the facts.

goods," to "use due diligence and reasonable care in selecting and maintaining agents who are sufficiently knowledgeable, fit, willing, and able to provide adequate household goods transportation services * * * and to fulfill the obligations imposed upon them by the Interstate Commerce Act] and by such carrier." 49 U.S.C. § 10934 (b).

As is typical in the industry, Atlas has long required that its agents not work for any other van line (Pet. App. 59a-60a). However, prior to the adoption of the "carrier-agent policy" at issue here, 91 of Atlas' 490 odd-agents were "carrier-agents," *i.e.*, were permitted under a joint "pooling agreement" to carry household goods under independent ICC authority of their own in addition to serving as Atlas agents.[5] The district court explained the advantages of such carrier-agent status as follows:

> "[A] carrier-agent may * * * accept certain shipments for carriage on its own account—rather than that of the principal carrier for which it serves as an agent—when the distance of the shipment does not exceed the geographic range of its independent authority and when other factors render it profitable for the carrier-agent to do so. * * * Some carrier-agents, moreover, enjoy the distinct benefit of using van line personnel, van line uniforms and equipment (with van line insignia), and van line origin and destination services even on shipments carried out on their own, independent authority, * * * and thus can avoid the costs of building the business infrastructure necessary to exercising their independent carrier authority effectively. * * * Atlas carrier-agents, for example, enjoyed this latter benefit prior

[5] The pooling agreement between Atlas and such agents had been approved by the ICC, *Atlas Van Lines, Inc.*, 70 M.C.C. 629 (1957), 75 M.C.C. 175 (1958), and therefore was exempt from application of the antitrust laws under 49 U.S.C. §§ 11341-11342. See Pet. App. 4a.

> to the events at issue in this lawsuit." [Pet. App. 56a-57a]

The Court of Appeals noted that "[b]y their own assertions, appellants establish that the carrier agents in the Atlas organization have benefited from Atlas' business infrastructure in carrying shipments made for their own accounts" (Pet. App. 23a) and agreed with the district court "that many of the services supplied as part of Atlas' arrangement with the carrier agents' arrangement resulted in Atlas subsidizing its competitors" (Pet. App. 25a; see Pet. App. 115a).

Until the late 1970s, the extent of carrier-agents' independent interstate operations was limited by regulatory restrictions on common carrier authority. Moreover, ICC regulations in force until 1981 required that carrier-agents use the same tariffs as their principal carriers when carrying shipments under independent authority. (Pet. App. 62a-63a) Thus, the regulatory scheme confined within relatively narrow bounds the scope of competition between agents and their van line system, and thereby mitigated the conflict between a carrier-agent's self-interest in maximizing use of its own authority and its duties as an agent for its van line.

In the Court of Appeals' words, "[t]he deregulation of the moving industry, beginning in 1979, produced changes that had a profound impact on the relationship between van lines and their agents" (Pet. App. 4a); the district court similarly found "a dramatic change in [the] business circumstances" under which Atlas had allowed its agents also to compete with the van line as independent interstate carriers (Pet. App. 63a). The ICC's 1979 *Policy Statement on Motor Carrier Regulation*, 44 Fed. Reg. 60296, and the Motor Carrier Act of 1980, 94 Stat. 793, made it much easier for agents to obtain and expand independent authority. The Household Goods Transportation Act of 1980, 94 Stat. 2011, added a new provision (49 U.S.C. § 10934(a), quoted at

p. 3, *supra*) imposing strict responsibilities upon van lines for acts of their agents "within [their] actual or apparent authority." And then the ICC revoked its rule forbidding price or service competition between carrier-agents and their principal carriers. *Practices of Motor Common Carriers of Household Goods; Revision of Operational Regulations*, 46 Fed. Reg. 16200, 16212 (1981), *affd, North American Van Lines, Inc.* v. *ICC*, 666 F.2d 1087 (7th Cir. 1981).

> "Thus, as a result of deregulation, Atlas faced the prospect of potential Atlas shipments being shifted to independent carrier-agent accounts 1) by many more agents than before, 2) on long distance hauls as well as local hauls, and 3) with greater frequency due to newly authorized price competition from its carrier-agents in their independent capacities. * * * Atlas carrier-agents, nevertheless, continued to reap a substantial benefit from the use of the Atlas infrastructure * * *. After deregulation, moreover, this practice threatened to saddle Atlas with significant liability problems * * *." [Pet. App. 64a-65a]

In response to these new conditions, Atlas' management and board of directors decided that structural changes had to be made in its agency system. Following several proposals and initiatives that were almost immediately abandoned,[6] Atlas adopted in February 1982 the "carrier-agent policy" upon which plaintiffs' claims below focused. Under this new policy, Atlas withdrew from the "pooling agreement" under which carrier-agents had functioned and announced that it would not continue to have agents holding independent interstate authority; any agent can, however, have a "carrier affiliate" under common ownership if the affiliate operates under a new and distinct name outside the Atlas network. (Pet. App. 66a-69a; see Pet. App. 5a-6a) Following unsuccessful chal-

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[6] These various abortive proposals and initiatives are discussed in the district court's opinion at Pet. App. 66a-67a n.6 and 124a n.22.

lenges by petitioners and other carrier-agents at the ICC[7] and the district court's denial of a preliminary injunction in the present action,[8] the policy went into effect in August 1983 (Pet. App. 71a). Thereafter, a majority of the 91 former Atlas carrier-agents shifted their independent authority to carrier affiliates under common ownership, 20 abandoned their independent authority, and 23 ceased to be Atlas agents; many of the last group joined other national van lines which continued to accept carrier-agents (Pet. App. 71a-72a).

Although the courts below correctly deemed the independent policies of other van lines concerning carrier-agents immaterial to the lawfulness of the Atlas policy, it should be noted that the assertions on this subject at pages 18-20 of the petition do not accurately reflect the undisputed evidence in the record. In fact, as the district court noted, petitioners and others dissatisfied with the new Atlas policy had the viable alternative option of joining "one of the other van lines that do subsidize carrier-agents * * *" (Pet. App. 115a).[9] The premise of petitioners' first question that there were "parallel restraints by leading firms foreclosing in the aggregate over 70% of the market" (Pet. *i*) is entirely unfounded, both for this reason and because there is no basis for any claim of market concentration.[10] Moreover, there is

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[7] See Pet. App. 69a-71a.

[8] *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 1983-1 Trade Cas. [CCH] ¶ 65,331 (March 30, 1983). Petitioners and others appealed from both the ICC decisions and the denial of a preliminary injunction, but dismissed the appeals before oral argument.

[9] The information provided by the five largest van lines in response to plaintiffs' discovery requests showed that three of them still welcomed carrier-agents. Statement Of Material Undisputed Facts In Support of Plaintiffs' Motion for Partial Summary Judgment As To Liability ("PSF") Appendix G.

[10] The derivation of petitioners' 70% figure is nowhere explained; much less is there any record support for the statement (Pet. 9)

no evidence anywhere in the record suggesting the slightest concert among van lines with respect to their varied policies concerning carrier-agents.

B. The District Court Decision

The district court's decision followed the completion of exhaustive discovery on all liability issues and was based upon a voluminous record of deposition transcripts and documents. Plaintiffs did not offer any showing of need for additional discovery and, as noted above, there has never been any substantial dispute as to the facts upon which the courts below relied in granting and affirming summary judgment in Atlas' favor. See p. 2, n.1, *supra*.

In a lengthy opinion (Pet. App. 47a-125a), the district court held that the challenge to Atlas' carrier-agent policy failed as a matter of law because "[t]he undisputed facts demonstrate that plaintiffs in this action cannot meet either of [the Sherman Act § 1] criteria," *i.e.*, cannot show the existence of *either* a "contract, combination * * * or conspiracy" *or* "an unreasonable restraint of trade under either the *per se* rule or the rule of reason, as appropriate." (Pet. App. 76a-77a)

With respect to the first criterion, the court held that neither the action of the Atlas Board of Directors in adopting the carrier-agent policy nor the communications by which it was promulgated to agents involved the requisite concert of action, for two independent reasons: (1) because 49 U.S.C. § 10934(d) categorically immunizes

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that six van lines carry "80% of the longer haul interstate household goods shipments." In fact, stipulated market share data showed that a total of 15 van lines account for 70% of the market (Pet. App. 14a n.3). It is indisputable, as the Court of Appeals noted, that the interstate household goods moving market is "*low* on the range of *unconcentrated* markets" (Pet. App. 20a) and that "interbrand competition * * * is intense in the van line industry * * *" (Pet. App. 21a n.8). And Atlas, with less than 6%, "is by no means a dominant force in the market" (Pet. App. 14a n.3).

the deliberations of a van line's board of directors and the van line's communications with its agents concerning their ownership of other common carriers;[11] and (2) because there was no evidence to support any inference either that the Board members were acting otherwise than on behalf of the unitary interests of Atlas[12] or "that Atlas's actions amounted to anything other than the unilateral announcement of a policy change and its subsequent implementation" (Pet. App. 97a), *i.e.*, a situation inconsistent with the notion of any "conscious commitment to a common scheme" on the part of the agents.[13]

The district court then went on to hold further that—even assuming concerted action and no statutory immunity—the undisputed facts would preclude both plaintiffs' *per se* claim that the carrier-agent policy was a boycott and price maintenance scheme and plaintiffs' alternative claim that the policy violated the rule of reason (Pet. App. 100a-101a).

As to the *per se* claim, the district court took for its text the principle of *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977), as restated locally

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[11] Pet. App. 81a-89a, 96a-97a. This section of the Interstate Commerce Act, added in 1980, provides in pertinent part:

> "The antitrust laws * * * do not apply to discussions or agreements between a motor common carrier providing transportation of household goods * * * and its agents (whether or not an agent is also a carrier) related solely to * * * (4) ownership of a motor common carrier * * * by an agent or membership on the board of directors of any such motor common carrier by an agent."

[12] Pet. App. 77a-81a, 89a-95a. The court here relied on *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984), and related cases.

[13] Pet. App. 97a-99a. The court here relied on *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and its confirmation of the continuing vitality of *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919).

in *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173, 1181 (D.C. Cir. 1978), that "[*p*]*er se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive." (Pet. App. 102a-104a) Noting the "unique nature of the business relationship between van lines and their carrier-agents," the uncertain impact of deregulation, the indisputable tendency of the new policy to "enhance inter-carrier competition among the national van lines" and the fact that the new policy "represents nothing more than the adoption of a method of operation—exclusive agency—that is 'widely used' not only in the van line industry, but throughout commerce," the district court concluded that

> "[T]he 'demanding standards' for application of *per se* treatment have simply not been met. Rather, 'the courts have had too little experience with this type of restraint, and know too little of the 'economic and business stuff' from which it issues, confidently to declare it illegal without undertaking the analysis enjoined by the rule of reason.'" [Pet. App. 107a, citing *Smith*, 593 F.2d at 1182]

Turning to the rule of reason claim, the district court applied the classic test which the D.C. Circuit's *Smith* decision had summarized as follows:

> "Under the rule of reason, a restraint must be evaluated to determine whether it is significantly anticompetitive in purpose or effect. In making this evaluation, a court generally will be required to analyze 'the facts peculiar to the business, the history of the restraints, and the reasons why it was imposed.' If, on analysis, the restraint is found to have legitimate business purposes whose realization serves to promote competition, the 'anticompetitive evils' of the challenged practice must be carefully balanced against its 'procompetitive virtues' to ascertain whether the former outweigh the latter. A restraint is unreasonable if it has the 'net effect'

of substantially impeding competition." [Pet. App. 108a, quoting from 593 F.2d at 1183] [14]

The district court noted at the outset of its rule of reason analysis that "[c]lassic agency law * * * gives a principal the prerogative of withdrawing [its agents'] permission [to compete with the principal] if convenient to protect the principal's interests" (Pet. App. 109a), and that Congress had indeed endorsed this prerogative of a van line as consistent with the antitrust laws in its 1980 revision of the governing legislation (Pet. App. 109a-112a).[15] The court went on to find that there could be no adverse effect upon *competition* (as distinguished from plaintiffs as *competitors*) because Atlas agents remained free to have carrier affiliates under common ownership or to become carrier-agents for other van lines.

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[14] The quoted passage in turn draws upon *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978), *Continental T.V., supra*, and *Board of Trade of City of Chicago* v. *United States*, 246 U.S. 231 (1918).

[15] The court quoted and discussed the following statement in the Senate Report on enactment of the Household Goods Transportation Act of 1980, S. Rep. No. 96-497, 96th Cong., 1st Sess. 8 (1979):

> "During the course of its deliberations, the Committee considered a proposal to include within the immunity section [49 U.S.C. § 10934(d)] language that would grant immunity to agreements concerning exclusive agency representation, or the fiduciary duty of loyalty of an agent not to compete with the principal concerning the subject matter of the agency. The Committee determined that *this type of relationship is not a violation of the antitrust laws and is standard agency law* as expressed in Section 393 of the Restatement of the Law of Agencies section. The Committee felt that inclusion of such language could imply that such relationships are a violation of the antitrust laws in the absence of immunity. Thus, the Committee determined not to include such language in the bill." [Emphasis added]

The Court of Appeals also viewed this congressional statement as indicative of "the utility of restraints of the sort Atlas imposes." (Pet. App. 34a).

> "[T]he true effect of the Atlas policy is, in essence, only to prevent agents who do exercise independent authority from appropriating to themselves any aspect of the Atlas network for the support services and overhead equipment necessary to operate that interstate authority beyond any great distance. The new arrangement essentially terminates a subsidy previously available to an Atlas carrier-agent at the expense of Atlas. At the same time, agents who wish to continue to operate as 'carrier-agents' are not barred from seeking to join one of the other van lines that do subsidize carrier-agents in this way. Thus, the only enduring anticompetitive harm demonstrated by the plaintiff is the loss of the opportunity to continue to operate in a traditional carrier-agent relationship with Atlas itself." [Pet. App. 114a-115a]

Finally, the district court found that even if there were any "legally cognizable anticompetitive effect,"

> "there stands balanced against it the plain and significant procompetitive impact on competition among the national van lines. Plaintiffs do not dispute in any material way that enforcing traditional agent loyalty from Atlas agents will strengthen Atlas's competitive position vis-a-vis the other national van lines, particularly those that already require their agents to work with them alone. Plaintiffs concede that carrier-agency reduced the amount of traffic carried on Atlas's account * * * and cannot plausibly argue that carrier-agency did not or would not expose Atlas to increase liability—at least to some extent—for shipments carried out under Atlas's actual or *apparent* authority. * * * Atlas's new policy eliminated these competitive vulnerabilities, and thus, as shown above, had a legitimate business purpose with a plain procompetitive effect." [Pet. App. 122a-124a]

C. The Court of Appeals Opinions

The Court of Appeals affirmed, with a majority opinion by Judge Bork (in which Judge Ruth Bader Ginsburg joined) and a concurring opinion by Judge Wald. Judge Bork's opinion proceeded from the premise that Atlas' carrier-agent policy should be treated as a horizontal agreement, cognizable under the antitrust laws, by which Atlas and potentially competing agents set terms on which they would compete with one another. This premise was based upon a briefly articulated rejection of the district court's conclusion that the plurality of actors required by Sherman Act § 1 was lacking (Pet. App. 8a-9a) and a determination not to reach the question of statutory exemption under 49 U.S.C. § 10934(d) "[b]ecause the reasonableness of the restraint is so clear" (Pet. App. 7a). Judge Bork's opinion then went on to agree (as did Judge Wald's) with the district court's alternative conclusion that the carrier-agent policy did not fall into any category of *per se* illegality and conformed with the rule of reason.

In holding that petitioner's boycott theory did not establish any *per se* violation, Judge Bork's opinion relied particularly on this Court's intervening decision in *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 105 S. Ct. 2613 (1985) (Pet. App. 12a-13a, 38a-39a). In holding that petitioners could not fit the policy into any "price maintenance" or other *per se* mold, the opinion relied as well on *Broadcast Music, Inc.* v. *Columbia Broadcasting System* (*"BMI"*), 441 U.S. 1, 19-20 (1979), and *National Collegiate Athletic Ass'n* v. *Board of Regents of the University of Oklahoma* (*"NCAA"*), 468 U.S. 85, 99-102 (1984), concluding that the Atlas policy tended to have "redeeming competitive virtues" that were "reasonably necessary" to preserve the efficiencies of the van line system (Pet. App. 33a-40a).

In the course of a lengthy dissertation on the application of the Sherman Act to joint ventures and other horizontal integrations, Judge Bork opined that a general rule that all "horizontal eliminations of competition among legally independent persons or companies are automatically illegal" could have been inferred from *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972), and *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967) (Pet. App. 30a-32a). His opinion concluded, however, that "to the extent that *Topco* and *Sealy* stand for the proposition that all horizontal restraints are illegal *per se*, they must be regarded as effectively overruled" in the light of *BMI*, *NCAA* and *Northwest Wholesale Stationers* (Pet. App. 32, 35, 37, 39).

Like the district court's opinion and the concurrence, the majority opinion concluded that the undisputed facts also showed the Atlas carrier-agent policy to be consistent with the rule of reason. It found this to be so, based on an analysis of "the economic nature and effects of the system Atlas has created" (Pet. App. 13a), for two reasons: (1) because Atlas' share of less than 6% of the unconcentrated and intensely competitive nationwide moving market precluded any significant anticompetitive effect from a limitation on competition among Atlas agents (Pet. App. 14a, 19a-22a); and (2) because in any event "the record made in the district court demonstrates that the challenged agreement enhances the efficiency of the van line. The chief efficiency * * * is the elimination of the problem of the free ride." (Pet. App. 22a) Within the term "free ride," the opinion encompassed essentially all of the problems to which the district court's analysis of procompetitive effects had referred, including carrier-agents' ability to attract independent business based on "Atlas' 'national image'" and their use of the Atlas network for handling such business, all "at Atlas' expense" (Pet. App. 22a-25a). It noted the inevitable tendency of such free riding to undermine the effectiveness of the Atlas system (Pet. App. 25a-26a), and concluded:

> "The restraint at issue in this case, therefore, is a classic attempt to counter the perceived menace that free riding poses. By compelling carrier agents to transfer their interstate authority to a separate entity, Atlas can continue providing services at optimal levels, confident that it will be paid for those services.
>
> "The Atlas agreements thus produce none of the evils of monopoly but enhance consumer welfare by creating efficiency." [Pet. App. 26a]

Judge Wald's separate opinion concurred "in the result and in much of the reasoning of the panel's opinion," but expressed "several concerns * * * about the panel's analysis once it establishes that no *per se* violation existed and the restraint should be looked at under the rule of reason" (Pet. App. 42a). In particular, Judge Wald was "uncomfortable" with Judge Bork's "suggestion" that an absence of market power *alone* could suffice to avoid condemnation under the rule of reason even apart from the efficiency-producing virtues that his opinion alternatively described. She would, rather, have upheld the lawfulness of the Atlas carrier-agent policy on the basis of the "totality of circumstances," relying on both prongs of the analysis.

REASONS WHY THE PETITION SHOULD BE DENIED

Although petitioners have failed to articulate the questions they would have this Court decide with the clarity required by Rules 17 and 21 of this Court's Rules, it appears that they do not challenge here the lower courts' unanimous rejection of their claim of *per se* violation of Sherman Act § 1. Rather, they challenge the application of the rule of reason, claiming that Judge Bork's majority opinion gave undue emphasis to the small market share of the Atlas system and incorrectly evaluated the procompetitive virtues that would in any event offset any accompanying restraint. Such disputes about the application of the rule of reason to the particular circumstances of this case raise no important question of

federal antitrust law, and petitioners do not point to any genuine conflict of decisions.

1. Judge Bork's suggestion that Atlas' lack of market power in an unconcentrated and intensely competitive market *alone* suffices under the rule of reason was both correct, and in any event, inessential to the Court of Appeals' conclusion. It was inessential because Judge Bork's opinion expressly stated that "we need not rely entirely upon [an inference from the absence of market power] because the record made in the district court demonstrates that the challenged agreement enhances the efficiency of the van line" (Pet. App. 22a), and then proceeded to explain those procompetitive virtues at length.[16] It was correct because, as this Court has held in *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2, 31 (1984), a violation cannot be established under the rule of reason "[w]ithout a showing of actual adverse effect on competition * * *." [17]

Contrary to petitioners' argument, the suggestion that lack of market power alone defeats a plaintiff's claim under the rule of reason in no way conflicts with *FTC* v. *Indiana Federation of Dentists*, 106 S. Ct. 2009 (1986), *NCAA*, *supra*, or *General Leaseways, Inc.* v. *National Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir. 1984). In *Indiana Federation*, there was an express "finding of

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[16] Judge Wald's concurrence, like the district court's decision, relied on both the absence of anticompetitive effects and the presence of procompetitive virtues.

[17] Petitioners do not directly contest the determinations below that the undisputed facts showed that the Atlas policy did not threaten competition. They do not supply that missing element by their assertion that "[t]he parallel use of such similar restraints [by other van lines] foreclosed the bulk of the interstate market * * *" (Pet. 44). Apart from the fact that the assertion is contrary to the undisputed facts (see pp. 7-8, *supra*), it is irrelevant to the lawfulness of a practice such as this whether or not it is also followed by others when, as here, there is no evidence of concerted action with the others.

actual, sustained adverse effects on competition" (106 S. Ct. at 2019), and in *NCAA* the Court similarly held that "[a]s a factual matter, it is evident that [the defendant] does possess market power" (468 U.S. at 111) and "[t]he anticompetitive consequences of this arrangement are apparent" (*id.* at 106). To be sure, *NCAA* also held that "the absence of proof of market power does not justify a naked restriction on price or output" (*id.* at 109) and *Indiana Federation* repeated the same point (106 S. Ct. at 2018-2019), but the Atlas carrier-agent policy is plainly not a naked restriction and Judge Bork's suggestion does not refer to naked restrictions.[18] *General Leaseways* expressly *agrees* with Judge Bork's suggestion, holding that the rule of reason requires "that the plaintiff first prove that the defendant has sufficient market power to restrain competition substantially. * * * If not, the inquiry is at an end; the practice is lawful." 744 F.2d at 596.

2. Petitioners' attack on the Court of Appeals' assessment of the procompetitive virtues of the Atlas carrier-agent policy presents no issue warranting this Court's review. Petitioners do not—and cannot—seriously question the conclusions of both courts below that the policy had been shown to have the procompetitive virtue of maintaining the efficiency of the Atlas Van Lines system in a deregulated marketplace. The gravamen of the second and third questions stated in the petition is, rather, that the courts below should have accepted petitioners' contentions that this particular policy was not essential to the survival of the Atlas van line system—*i.e.*, not the "least restrictive alternative"—and that, indeed, it reflected poor business judgment because of "substantial countervailing benefits to Atlas from its association with the carrier agents" (Pet. 59-60). Petitioners merely ask

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[18] In both *NCAA* and *Indiana Federation*, this Court accepted findings that the challenged practices produced no "procompetitive efficiencies" whatsoever. 468 U.S. at 114; 106 S. Ct. at 2018.

this Court to rehash the rule of reason evaluations made by the district court and the Court of Appeals.

Both courts explicitly found that the policy was, under the undisputed facts, a patently reasonable response to the complex of problems—capsulized by Judge Bork in the term "free riding"—which were inherent in having carrier-agents and were dramatically exacerbated by deregulation. It is well settled that protection against the erosive effects of such free riding is a prime exemplar of the procompetitive "redeeming virtues" that will justify any restriction upon competition under the rule of reason. *Continental T.V., Inc.* v. *GTE Sylvania Inc., supra*, 433 U.S. at 54-55; see *Monsanto Co.* v. *Spray-Rite Service Corp., supra*, 465 U.S. at 762-763. And justification of a restriction of this nature does not—as petitioners would have it— require that a defendant be put "in the impossible position of guaranteeing that lawyers cannot imagine some method of achieving the business purpose in question while imposing a lesser restriction on interbrand competition." Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 Colum. L. Rev. 1, 36-37 (1978); see Handler, Twenty-five Years of Antitrust 705-708 (1973). *Continental T.V.* itself foreclosed any such requirement when it noted that the restraint remanded for rule of reason analysis there was "neither the least nor the most restrictive provision that [Sylvania] could have used." 433 U.S. at 58 n.29. If only the "least restrictive alternative" could have passed muster, no further inquiry would have been needed to condemn Sylvania's location clause and there would have been no reason for a remand. Instead, Sylvania's restriction was upheld on remand. *Continental T.V., Inc.* v. *G.T.E. Sylvania Inc.*, 694 F.2d 1132, 1138 n.11 (9th Cir. 1982).

The decisions below not to second-guess the reasonable business decision of Atlas' management and board of directors as to how best to structure the van line system

in response to changing circumstances were also consistent with those of other courts of appeals in similar situations.[19]

3. Even if the questions stated by the petition were read as challenging the correctness of the lower courts' rejection of petitioners' *per se* claims—and we believe they cannot be so read—there would be no occasion for further review on that ground. Judge Bork's majority opinion put the *per se* issue in the most favorable possible light for petitioners by treating the Atlas policy as a horizontal agreement among competitors,[20] and even in that light it was plainly correct in finding no basis for a *per se* claim. *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, *supra*, forecloses any *per se* boycott claim because it is indisputable that at least some restraints upon agents' activities are essential to the operation of a van line and there are "plausible arguments" that the carrier-agent policy was "intended to enhance overall efficiency and make markets more competitive." 105 S. Ct. at 2620. And even if the policy directly restricted price competition (as it did not), such a restriction is not condemned *per se* where it is an element of a cooperative enterprise. *Broadcast Music, Inc.* v. *Columbia Broadcasting System*, *supra*, 441 U.S. at 23; *National Collegiate Athletic Ass'n* v. *Board of Regents of the University of Oklahoma*, *supra*, 468 U.S. at 99-102. The inappropriateness of trying to fit the present case into any *per se* mold is confirmed by this Court's

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[19] *E.g.*, *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1249-1250 (3d Cir. 1975); *Kentucky Fried Chicken Corp.* v. *Diversified Packaging Corp.*, 549 F.2d 368, 381 (5th Cir. 1977); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 78 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

[20] We believe the district court was correct in finding no plurality of actors and that in any event the Court of Appeals would have agreed with the district court's finding of a statutory exemption had it reached the question.

decision last Term (the day before the Court of Appeals decision below was released) in *FTC* v. *Indiana Federation of Dentists, supra*, which noted that "we have been slow * * *, in general, to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious * * *." 106 S. Ct. at 2018.

Indiana Federation's admonition against stretching *per se* rules casts doubt on Judge Bork's premise that the Atlas carrier-agent policy could be analogized to the purely horizontal market divisions condemned *per se* in *United States* v. *Sealy, Inc.* and *United States* v. *Topco Associates, Inc., supra.* In any event, Judge Bork's opinion did not strictly conclude that *Sealy* and *Topco* are "effectively overruled" on their own facts, but only "*to the extent that* [they] stand for the proposition that all horizontal restraints are illegal per se" (Pet. App. 32a, emphasis added; see also the similarly cautious language at Pet. App. 35a and 39a). Thus, the discussion of *Sealy* and *Topco* perhaps amounted to nothing more than setting up and knocking down a straw man; at most it was an academic detour that was not necessary to the result. Even if the petition properly presented such a *per se* question, it would therefore be inappropriate for further review under the familiar principle that "this Court reviews judgments, not opinions." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); see also, *e.g.*, *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ROTHERY STORAGE & VAN CO., INC., *et al.*,
Petitioners,

v.

ATLAS VAN LINES, INC.,
Respondent.

REPLY TO ATLAS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE SUPREME COURT
OF THE UNITED STATES

ROTHERY STORAGE & VAN CO., et al.

v.

ATLAS VAN LINES, INC.

REPLY TO ATLAS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

The Atlas opposition to a Writ appears to ask this Court to take as undisputed a critical "free riding" fact question disputed below, to ignore the issues presented, and to ignore large portions of the rationale used by the Circuit Court of Appeals in coming to its conclusions. Such benign neglect would disserve both the objectives of legislative decartelization of the transport industries,[1/] and consistency in the application of the antitrust laws.

1/ Note that a December 22, 1986, Business Week article, p. 50, calls for enhanced antitrust law enforcement to

The pivotal judgment of the Court of Appeals -- that the presence or absence of market power is to be determined solely on the basis of one market share measure, ignoring other relevant record information -- is simply characterized as "correct" in one portion of one sentence on grounds that rule of reason analysis requires a showing of "actual adverse effects on competition" The brief also attempts to avoid the issue by arguing that the finding was "inessential" because the Court below was of the opinion that the horizontal restraints improved the efficiency of the van line. (Opposition, p. 16).

A rule of reason analysis requires examination of anticompetitive potentials

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preserve and further the advantages of legislative "deregulation" of transport. This case presents an instance of transport networkers raising the entry costs of potential entrants, by concerted restraints.

and/or effects, as well as the "reasonable necessity" of the examined restraints to legitimate commercial goals. These separate issues are then linked in the final resolution of reasonableness. The Court of Appeals relied solely on a market share finding for the required determination of anticompetitive potentials and effects. It declined to inquire into actual effects upon competition because it judged that "It is impossible to believe that an agreement to eliminate competition within a group of this size can produce any of the evils of monopoly." (App. 14a) 2/ (Indeed its market share finding contributed to its conclusions on the commercial justification for the restraints. 3/)

2/ Note that the Circuit Court's unambiguous reasoning leads to the conclusion that any per se violation, such as price fixing, involving participants with market shares less than 10% could not produce any of the evils of monopoly.

3/ The Circuit Court went on to argue that "If it is clear that Atlas and its

Thus, the Court of Appeals did not reflect in its opinion or take any account of the evidence summarized on pages 17-20 of the Petition showing the anticompetitive purposes and effects of the horizontal restraints.

The separate statement of Chief Judge Wald, who voted in favor of rehearing this matter en banc, clearly identifies this central failure of analysis -- "... to my knowledge, the Supreme Court has not decided rule of reason cases solely by looking at market shares. Instead, it has looked to the totality of circumstances surrounding a restraint ... (App. 44a).

The Opposition's discussion of FTC v.

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agents by eliminating competition among themselves are not attempting to restrict industry output, then their agreement must be designed to make the conduct of their business more efficient. No third possibility suggests itself." (App. 22a). This logic leads to finding some market efficiency justification even for combinations historicially deemed in the per se category if the conspirators have small market shares.

Indiana Federation of Dentists, 106 S. Ct. 2009 (1986), NCAA v. Board of Regents of University of Oklahoma, 104 S.Ct. 2948 (1984) and General Leaseways v. National Truck Leasing Ass'n., 744 F.2d 588 (7th Cir. 1984) misses the relevant content of these cases and a principal point of this Petition -- which is that data additional to and other than market share can show the presence of significant market power, and the probability or actuality of anti-competitive effect. 4/

The Opposition's attempt to impeach by mere denial the data set out on pages

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4/ Indeed, a market power finding is not strictly necessary in either a rule of reason or per se analysis. In Indiana Dentists, the Court made no finding of market power. It simply found at 457-458 that dentists in certain Indiana counties had supplied less information to requesting insurers when acting in concert than did dentists whose competition had not been constrained by agreement to withhold data. The Court could observe clear interference with ordinary competitive processes, and found no significant countervailing benefits. In this case defendant admits that 20 carrier agents, about

18-20 of the Petition showing parallel action among leading participants household goods industry as to exclusive dealing contracts and restrictive "carrier agent policies" (p. 7), plus an assertion that the Petitioners are unreliable reporters (p. 2), 5/ is very weak.

1/5 of the directly targeted group, ceased all independent competitive interstate operations. Interference with competitive offers is apparent.

The ultimate question is whether competition is or is likely to be restrained. Identifiable market power is an indication of the capacity to restrain competition. Market share data are one, limited and imperfect, type of data bearing on the presence of market power.

5/ The Atlas brief globally accuses the Petitioners of distortion, on page 2, and cites a portion of the Court of Appeals opinion chastising the Petitioners for their use of one of their undisputed fact propositions. (Ap. 23a-24a, n. 9). Petitioners believe that note in the Court's opinion to be unwarranted. Petitioners had in their pleadings below cited materials in addition to the one fact statement identified by the Circuit Court which supported the fact proposition in the brief below, and that one reference to the material undisputed facts was indeed only illustrative of the composite of several. Partially by reason of this

Petitioners cited the specific portions of the record containing these data. Petitioner-cited documents evidencing the exclusive dealing clauses and carrier agent policies of the other leading van lines was entered into the record pursuant to stipulation of the parties. Atlas apparently disagrees as to the interpretation of these data. But it provides this Court no specific basis for its disagreement. Nor, more importantly, does it suggest any reasoned justification for the failure of the Court of Appeals (or for that matter the District Court) to reflect the existence of these materials in analyzing the competitive significance of the restraints imposed in the Atlas - "agent"

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background, Petitioners included in their Petition to this Court abundant cites to record materials. Petitioners believe any balanced comparison of their pleadings with the record below will sustain each and every contention made before all three courts.

horizontal accords. 6/

As to the Circuit Court's fundamen-

6/ As to Atlas' apparent attempt to impeach the market share data set out on pages 18-20 of the Petition, the Petitioners had pointed out to the courts below a top-15 carrier submarket, as an indicator of a long haul intercity submarket in which van lines were dominant. Leading-firm statistics have been compiled regularly by the Interstate Commerce Commission, and were the basis of the leading-firm market share data entered into the record by stipulation. Atlas can hardly claim ignorance of these data. The Opposition 's note 2 reference to "market shares" of the top 15 carriers seems to be an attempt to divert attention from this long-haul submarket. As to the Opposition's note 10 statement that Petitioners have not explained the derivation of their observation that over 70% of the long haul market was substantially foreclosed to the targetted carrier agents, one need only add the cited market shares for those carriers designated as having exclusive dealing and restrictive carrier agent policies in the table on pages 19 and 20 of the Petition. Note further that the Opposition refers to the same Petitoners' Appendix G compilation of data on the practices of other leading van lines as do the Petitioners, in their note 9, though characterizing these data incompletely. (The Opposition asserts that three other leading van lines "welcome" carrier agents without noting that they do so only if those carrier agents conform to extensive, roughly parallel, recently imposed restraints on their competitive operations.)

tal failure to consider whether an allegedly "ancillary" restraint is unnecessarily broad, and thus its failure to apply any form of least restrictive or less restrictive alternative analysis, the Atlas brief incredibly argues that "It is well settled that protection against the erosive effects of such free riding is a prime exemplar of the procompetitive "redeeming virtues" that will justify any restriction upon competition under the rule of reason." (Opposition, p. 18) (emphasis added).

Atlas' brief cites a note in Continental T.V., Inc. v. G.T.E. Sylvania, Inc. 433 U.S. 36, 58, n. 29 (1976). This note is referenced to the text's observation that the Court could not a priori assume that vertical restraints generally are likely to have pernicious anticompetitive effects or lack redeeming virtues, and in relevant part merely adds the observation

that Sylvania's vertical restraints did not appear to be the most or least restrictive imaginable. This brief observation obviously is not an explication of the analytic approach to be taken in rule of reason cases. One of the two cases cited by Atlas which appear to have any relevance to the question posed in this case, American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F. 2d 1230, 1249-50 (3rd Cir. 1975), suggests application of the traditional "reasonably necessary" standard to a potentally anticompetitive restraint. The other, Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 381 (5th Cir. 1977), suggests that the presence of less restrictive alternatives is a factor to be considered in the rule of reason analysis, though not necessarily the decisive factor. 7/ A law review article cited,

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7/ This case references Justice

Pitovsky, The Sylvania case: Antitrust Analysis of Non-Price Vertical Restrictions, 78 Colum. L. Rev. 1, 36-37 clearly suggests use of a "reasonable necessity" standard, in contrast to the carte blanche approval of any restraint urged by Atlas, and to the Circuit Court's explicit refusal to "calibrate degrees of reasonable necessity" (App. 36a)

"Reasonable necessity" can be judged only by determining whether a restraint is required to effectuate a licit goal. If alternatives to the restraint will adequately serve the claimed efficiency (or "contract integration") goal, then the restraint in question obviously is not

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Brennan's observations concerning the appropriateness of rule of reason examination of less restrictive alternatives, in a concurring opinion in White Motor Company v. United States, 372 U.S. 253, 271-2 (1963). The Circuit Court in Kentucky Fried Chicken inferred that the less restrictive alternative analysis was only one part of the total analysis required.

necessary. Thus, the traditional tests of ancillarity cited in Oregon Steam Navigation Co. v. Winsor, 87 U.S. 64, 66,67 (1873) (cited at p. 48 of the Petition), the "reasonable necessity" language of American Motor Inns, Justice Brennan's observations concerning investigation of less restrictive alternative questions in White Motor and the gist of Kreuzer v. American Academy of Periodontology, 735 F. 2d 1479, 1494-5 (D.C. Cir. 1984), are all consistent. The limiting bound on this analysis is that the progenitor of restraints not be required to satisfy an opposing lawyer's most fanciful post-hoc inventions, or meet some theoretical ideal of least conceivable restraint. But this is a limiting factor; not an excuse for ignoring or rejecting the essential question of "reasonable necessity" -- i.e. whether less restrictive alternatives were reasonably available.

The Circuit Court's opinion inescapably presents this Court the issue capsuled by Atlas in its brief -- whether "any restriction" claimed to be related to an efficiency objective, or in Judge Bork's phrase "subordinate and collateral to a separate, legitimate transaction" (app. 29a) will be sustained without examination of "reasonable necessity", or less restrictive alternatives. 8/ This court has never articulated such a standard. As pointed out in the Petition, recent decisions such as Broadcast Music Inc. v. C.B.S., Inc., 441 U.S. 1, 24 (1979) and Arizona v. Maricopa County Medical Society, 457 U.S. 332, 352-54,

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8/ Judge Wald noted this failure of analysis as well, in her note 4 (App. 43a-44a), stating that she understood the panel's position to be that the breadth of the restraint is a matter to be analyzed in determining whether the restraint is ancillary. But one searches the panel's opinion in vain for any such analysis, and indeed the panel explicitly rejected any examination into "degrees of reasonable necessity."

(1982) evidence continuing sensitivity to the need for discriminate analysis of claims of "reasonable necessity". To allow promulgation of the standard articulated by the Circuit Court and defended in naked terms by Atlas in its brief would eviscerate the rule of reason -- specifically the "ancillary restraint" element.

Atlas' third reason offered for declining to issue a writ (pp. 19-20) is not clear. Apparently Atlas is arguing that Judge Bork should not have considered this case as presenting horizontal restraints potentially subject to per se condemnation, and that the Circuit Court's discussion of United States v. Topco Associates, Inc., 405 U.S. 596 (1972), and United States v. Sealy Corp., 388 U.S. 350 (1967), was an "academic detour" merely "setting up and knocking down a straw man".

This apology for the Circuit Court's

opinion cannot be accepted. The Circuit Court clearly recognized horizontal restraints among competitors. It laboriously developed an explicit analytic apparatus for dealing with such restraints. This analytic apparatus was obviously designed for repeated future use: that is, to have precedential effect. Pursuant to that analysis, any horizontal restraint among competitors arguably collateral to some form of contract integration, involving less than 10% of a market, cannot be said to be anticompetitive, will be approved without careful inquiry into reasonable necessity, and thus will be the beneficiary of, in Judge Wald's phrase, "the panel's new per se rule of legality." (App. 42a). To reach this result the Circuit Court consciously and explicitly interpreted, reinterpreted and modified several major Supreme Court precedents, including Broadcast Music, Inc. v. C.B.S.,

441 U.S. 1 (1979) and Northern Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 105 S.Ct. 2613 (1985), as well as Sealy supra, and Topco, supra. The Supreme Court can ignore this appellate Court's pronouncement only if it wishes to allow conflicts with its prior opinions and with other circuits to persist for an indefinite period in the future.

The above disposes, Petitioners trust, of the Opposition's proferred reasons for not granting a writ. We devote a few additional words to the Opposition's treatment of the opinions below.

The Opposition selects portions of the District Court's opinion suggesting "free riding" on the part of the "carrier agents", and suggesting ready availability of alternatives for carrier agents with other van lines. The Petitioners challen-

ged the District Court's "free riding" thesis on appeal, referring to statements of undisputed fact and other record evidence bearing on the issue. 9/ The Appellate Court, presented with these challenges, refined the analysis. But as the Petition points out, the Court of Appeals could find free riding only by taking into

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9/ The District Court erred in its general assertion that the Plaintiffs did not controvert Defendants' proposed statements of material fact, as, Petitioners believe, any detailed examination of the proferred fact statements and comments of the opposing parties will reveal. Petitioners set out relevant disagreements before the Court of Appeals Further, the District Court made numerous fact analysis errors. E. g. it erred factually in attributing to carrier agents use of Atlas "overhead" facilities when operating independently, for reasons set out on pages 22-24 of the Petition, and analytically in supposing that when a "carrier agent" contracted independently with another independent moving firm for origin or destination service on its own independent shipments, and paid that other indepenently owned firm out of its own revenues, it was somehow using a proprietary asset of Atlas'. As noted in the text, the Court of Appeals appears to have avoided these specific errors, for the most part, but made others.

account only one side of an exchange of "intangible" benefits, and failing to take into account that it was dealing with a relationship which relied on price to equilibrate benefits and burdens.

The Atlas brief would elevate "free riding" to the status of a market imperfection of general prevalence justifying any restraint arguably directed at redress. Though "free riding" has become a concept of some importance in contemporary antitrust analysis, in a specific case the existence of free riding potentials, or actual free riding, is a question of fact. The free ridership fact question is apt to be complex and not readily resolvable on cross motions for summary judgment. The Petition points out the failure of the Court of Appeals to address the question properly.

Other failures of the portions of the opinions below cited in the Atlas brief

are noted in the margin. 9/

Lastly, the Petitioners have not

9/ As to the availability of alternatives for carrier agents, see pp. 43-45 of the Petition, and pp. 6-7, infra. The District Court apparently was blinded by the assumption, without any supporting economic analysis, that exclusive dealing contracts were necessary, and thus did not examine their market effects.

The District Court erred in asserting that the Plaintiffs must concede procompetitive effects of the carrier agent policy. Plaintiff's dispute the "free rider" thesis, and note that the motivation and incidents of the policy aimed at potential "carrier agent" competition rather than improving the van line's market offers.

Both courts below noted Senate report language indicating that exclusive dealing contracts in the household goods sector were not presumptively violative of the antitrust laws. Neither court took into account that in doing so Congress rejected antitrust immunity for such contracts, and that this case presents the cumulative effect of adding restraints to those already extant in a previously cartelized industry. Congress could not foresee all the permutations of use of exclusive dealing clauses, including uses of such clauses in combination with other practices, in a newly deregulated framework. It falls to the courts to determine whether in specific situations combinations of practices having preclusive tendencies constitute per se or rule of reason violations.

abandoned any claim of per se violation, as Atlas would have this Court believe. Petitioners assert that the Court of Appeals' analysis precludes proper application of both per se rules and the rule of reason. This is apparent from pp. 26-30 of the Petition, heading number one on page 35 of the Petition, and the text on pp. 35-41 of the Petition.

CONCLUSION

The weaknesses of the opposition to the Petition for Certiorari are, Petitioners submit, a direct consequence of the extreme and indefensible nature of the new antitrust paradigm fabricated by the Court below. The far reaching new theses articulated below require review and revision. The Petitioners urge this Court to issue its Writ.

Respectfully submitted,

C. Jack Pearce